

No. 16008 ✓

United States
Court of Appeals
for the Ninth Circuit

SKOKOMISH INDIAN TRIBE, Appellant,

vs.

E. L. FRANCE, Trustee, et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District Court of the United States, Western
District of Washington, Southern Division

No. 1183

THE SKOKOMISH INDIAN TRIBE,

Plaintiff,

vs.

E. L. FRANCE, Trustee, CARRIE H. KLEIN, a widow, CLARA B. VANCE, ESTATE OF E. S. AVEY, MINNIE E. WATSON, W. H. FRANCE, JANE DOE FRANCE, E. L. FRANCE and LEO B. FRANCE, husband and wife, ERNEST CARLSON and HULDA S. CARLSON, husband and wife, GEORGE F. WOLF and VIVIAN A. WOLF, husband and wife, POTLATCH COMMERCIAL AND TERMINAL COMPANY, a corporation, RALPH E. ALEXANDER and ADELINE T. ALEXANDER, husband and wife, ROBERT T. SHELDON and LILLIAN C. SHELDON, husband and wife, ALLEN M. STRINE, DANIEL R. DORAN and FLORENCE DORAN, husband and wife, SIMPSON LOGGING COMPANY, CITY OF TACOMA, a municipal corporation, GEORGE SIMPSON, GEORGE W. WILLIS, and GRACE F. WILLIS, husband and wife, JOHN W. PHILLIPS and JEAN S. PHILLIPS, husband and wife, ERNEST WORL and BEULAH WORL, husband and wife, PHOENIX LOGGING COMPANY, C. H. EVERETT and LILLIAN EVERETT, husband and wife, WALTER ASEN and LORRAINE ASEN, LUELLA L. GREELEY, CARL J. MACKE and FLORENCE MACKE, husband and wife, F. G. CHAPMAN and BERTHA A. CHAPMAN, husband and wife, FRED HANSON, WALLACE O. HANSON, BUSTER F. HANSON, OLYMPIA F. KERN, AGNES GRANGER, ALICE HANSON, THE CASCO COMPANY, a Washington corporation, SEATTLE FIRST NATIONAL BANK, MILLARD LEMON, J. T. THACKER, LOLA F. FALKNOR, A. J. FALKNOR, ANNIE P. THACKER, FRED BARNES, WANDA BARNES, N. WARD, FRANK WARD, SIDNEY WARD, LAWRENCE WARD, STATE OF WASHINGTON, JAMES J. SMITH,

HOMER THACKER, JESSIE M. HOPKINS, MARCUS NALLEY and FRANCES NALLEY, husband and wife, E. A. SIMS, CHARLES T. WRIGHT, PAUL HUNTER and JANE DOE HUNTER, his wife, FRANK A. ROBISON, UNITED STATES OF AMERICA (Bonneville Power Administration),
Defendants.

COMPLAINT

Comes now the Skokomish Indian Tribe, a tribe of Indians incorporated under the Act of Congress, June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935, (49 Stat. 378) and brings this complaint by and through its attorneys, and alleges:

I.

That the Skokomish Indian Tribe is a tribe of Indians incorporated under the Acts of Congress herein set out, living near or adjacent to the Skokomish Indian Reservation in the state of Washington, and acting pursuant to its corporate charter and constitution and bylaws has by resolution of its Tribal Council authorized its attorneys herein to bring the within action.

II.

That the jurisdiction of this Court arises in this matter for the reason that plaintiff is an Indian Tribe incorporated under the Acts of Congress, and the rights demanded to be protected arise out of an Indian treaty entered into between said Indian Tribe and the United States, and the matter in controversy exceeds, exclusive of interest and costs the sum of Three Thousand Dollars.

III.

That the Skokomish Indian Reservation is situated at the head of Hood's Canal in the state of Washington, and includes tidelands on the Canal within the boundaries of said Skokomish Indian Reservation.

IV.

That by the Treaty of January 26, 1855, entered into between the United States of America and the Skokomish Indian Tribe, together with other tribes, certain lands in the vicinity of Hood's Canal were ceded to the United States (Treaty of January 26, 1855, proclaimed April 29, 1859—12 Stat. 933).

V.

That Article 2 of said Treaty of January 26, 1855, reserved to the tribes executing said treaty, including the Skokomish Indian Tribe, the plaintiff herein, an aggregate of six sections of land at the head of Hood's Canal, in the following language:

“Article 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz: The amount of six sections, or three thousand eight hundred and forty acres situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may

be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so."

VI.

That by Executive Order of February 24, 1874, President Grant set aside the present Skokomish Indian Reservation, employing a metes and bounds description, contained in the following Order:

"Executive Mansion,

February 25, 1874.

"It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stats. at Large, vol. 12, p. 934), described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33 and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, the same

being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26 and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.

U. S. Grant."

VII.

Article 4 of said Treaty of January 26, 1855, reserved to the tribes of Indians, including the Skokomish Indian Tribe, certain fishing rights by the following language:

"Article 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, However, That they shall not take shell-fish from any beds staked or cultivated by citizens."

VIII.

That it was the intent and purpose of the United States of America and the tribes of Indians executing said treaty of January 26, 1855, to encourage said tribes of Indians to reside at one place on a reservation to be set aside for their use and occu-

pancy, which was done by the Executive Order of President Grant, dated February 25, 1874. That the tracts of land so selected were to be sufficient for their wants as they then existed and continued to exist in the future.

IX.

That by virtue of said Executive Order of February 25, 1874, the uplands therein described together with the shorelands in the Hood's Canal became and were at all times reserved to the exclusive use, benefit and occupancy of the Skokomish Indian Tribe, together with the exclusive right for the use of the bed of Hood's Canal and all tidelands touching upon and bordering the reservation, and with the exclusive right as guaranteed by Article 4 of said Treaty of January 26, 1855, to fish in all the waters bordering upon the reservation as set out by said Executive Order, including the tidal waters thereof which border upon and touch said reservation.

X.

That the exclusive right of fishing was to be free from interference from the State of Washington, or any person or persons claiming under or by virtue of any title granted them by the state of Washington and subject only to the exclusive jurisdiction of the United States.

XI.

That by reason of the tidal waters flowing and ebbing in the Hood's Canal there are certain lands bordering upon the Reservation of the Skokomish

Indian Tribe as hereinabove described, which provide an excellent and profitable source of shell fish having a high commercial value.

XII.

That the State of Washington has granted by conveyance, lease, or otherwise, certain rights to the defendants herein named to the lands hereinafter described in, upon, over and across and through the tide-lands bordering upon the Skokomish Indian Reservation as hereinabove described. That said conveyance, grant, lease, or otherwise, and the defendants claiming the rights thereunder in conflict with the reserved rights of the plaintiff herein are described as follows:

The following defendants claim interest in the following described land:

E. L. France, Trustee, Carrie H. Klein, a widow, Clara B. Vance, Estate of E. S. Avey, Minnie E. Watson, W. H. France, Jane Doe France, E. L. France and Leo B. France, husband and wife. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the north half of tract two (2), lot three (3), section twenty-six (26), township twenty-two (22) north, range four (4) west, W.M., with a frontage of 5.13 lineal chains, more or less, measured along the meander line according to a certified copy of the government field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The following defendants claim interest in the following described land: Ernest Carlson and Hulda S. Carlson, husband and wife, Potlatch Commercial and Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland tracts, and extending to the line of extreme low tide: Tracts numbered ninety-nine (99) to one hundred two (102) inclusive; Tracts one hundred nine (109) and one hundred ten (110); Tracts one hundred thirteen (113) and one hundred fourteen (114) and Tracts one hundred sixteen to one hundred nineteen (116-119) inclusive, Potlatch Beach Tracts, according to the recorded plat thereof in the office of the Auditor for said County and State, Volume 4 of Plats, page 26, records of Mason County, Washington.

The following defendants claim interest in the following described land: George F. Wolf and Vivian A. Wolf, husband and wife, Potlatch Commercial and Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland tracts, and extending to the line of extreme low tide; Tracts numbered one hundred three (103) and one hundred four (104), Potlatch Beach Tracts, according to the recorded plat thereof in the office of the Auditor for said County and State, Volume 4 of Plats, page 26, records of Mason County, Washington.

The following defendants claim interest in the following described land: Ralph E. Alexander and Adeline T. Alexander, husband and wife, Potlatch Commercial and Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland tracts, and extending to the line of extreme low tide; Tracts numbered one hundred five, one hundred six, one hundred seven and one hundred eight (105, 106, 107 and 108), Potlatch Beach Tracts, according to the recorded plat thereof in the office of the Auditor for said County and State, Volume 4 of Plats, page 26, records of Mason County, Washington.

The following defendants claim interest in the following described land: Robert T. Sheldon and Lillian C. Sheldon, husband and wife, Allen M. Strine, Potlatch Commercial and Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland tracts, and extending to the line of extreme low tide; Tracts one hundred eleven (111) and one hundred twelve (112), Potlatch Beach Tracts, according to the recorded plat thereof in the office of the Auditor for said County and State, Volume 4 of Plats, page 26, records of Mason County, Washington.

The following defendants claim interest in the following described land: Daniel R. Doran and

Florence Doran, husband and wife, Potlatch Commercial and Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland tracts, and extending to the line of extreme low tide; Tract one hundred fifteen (115) Potlatch Beach Tracts, according to the recorded plat thereof in the office of the Auditor of Mason County, Washington, Volume 4 of Plats, page 26.

The following defendants claim interest in the following described land: Simpson Logging Company, City of Tacoma, a municipal corporation, George Simpson, Potlatch Commercial and Terminal Company, a corporation. All tidelands and shorelands of the second class, situate in front of, adjacent to or upon the Government Meander line, and extending to the line of extreme low tide, in front of Government Lot 1, Section 26, Township 22 North, Range 4 West, W.M., Except, that portion thereof conveyed to Ernest Carlson and Hulda S. Carlson, husband and wife, by deed dated June 2, 1941, filed June 23, 1941, as file No. 98452, and recorded in Volume 74 of Deeds, page 223, records of Mason County, Washington. Also known as Tax No. 266 except B, C, D and E; and Tax No. 266A, except A1, 2, 3, 4; containing 21.80 lineal chains.

The following defendants claim interest in the following described land: City of Tacoma, Pot-

latch Commercial Terminal Company, a corporation, State of Washington. Parcel 1: All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon that portion of the government meander line in front of the North one hundred (100) feet of Government Lot two (2), Section twenty-six (26), Township twenty-two (22) North, Range Four (4) West, W.M., and extending to the line of extreme low tide.

Parcel 2: All that certain tract of tide land of the second class lying between the Government Meander Line and the line of extreme low tide abutting upon Lot 2, Section 26, Township 22 North, Range 4 West, W.M., the location of which is particularly described as follows: Beginning at a point on the said meander line that is 100 feet distant, measured due south, from the North line of the said Lot 2; running thence by the courses of the said meander line South 40 deg. W., S. 4 deg. E., and South to a point thereon that is 906.8 feet distant, measured due south, from the said north line of Lot 2, being the tide land in front of said Lot 2, aforesaid, excepting a strip of 100 feet in width deducted on the north side of said Lot, and also a strip of 457.8 feet in width deducted on the south side of the same, containing 6 acres, more or less.

The following defendants claim interest in the following described land: George W. Willis and Grace F. Willis, husband and wife, John W. Phil-

lips and Jean S. Phillips, husband and wife, Ernest Worl and Beulah Worl, husband and wife. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon that portion of the government meander line in front of the south 460 feet measured along the west line of Indian Tract No. 2 of Government Lot 2, Section 26, Township 22 North, Range 4 West, W.M., and extending to the line of extreme low tide. Excepting therefrom, however, the following two portions:

1. A portion of the above as conveyed to George W. Willis and Grace F. Willis, husband and wife, by deed dated, January 20, 1947 and recorded in Volume 106 of Deeds, page 390, records of Mason County, Washington, described as follows: All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland, and extending to the line of extreme low tide; beginning at the intersection of the South line of said Government Lot 2 with the Easterly right-of-way line of Primary State Highway No. 9 (Olympic Highway); thence East along the south line of said Government Lot 2, to a point thereon which is 172 feet east from the center line of the existing pavement of said State Highway; thence due North $87\frac{1}{2}$ feet; thence Northeasterly 113 feet more or less, to a point on the Easterly line of said Government Lot 2 which is 134 feet northerly from the southeast corner of said Government Lot 2; thence northerly, along the easterly line of said

Government Lot 2, 80 feet; thence westerly to a point on the easterly right-of-way line of Primary State Highway No. 9 (Olympic Highway), which is 101 feet northerly thereon from the point of beginning; thence following along the easterly right-of-way line of said State Highway and in a southerly direction to the point of beginning.

2. A portion of the above as conveyed to John W. Phillips and Jean S. Phillips, husband and wife, by deed dated September 26, 1947, and recorded in Volume 113 of Deeds, page 60, records of Mason County, Washington, described as follows: All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland, and extending to the line of extreme low tide: A tract of land situated in Government Lot 2, and being a part of Indian Lot or Tract No. 2 in said Government Lot 2, Section 26, Township 22 North, Range 4 West, W.M., particularly described as follows: Beginning at a point on the south line of said Government Lot 2, which is 172 feet east from the center line of the existing pavement of Primary State Highway No. 9 (Olympic Highway); thence due North $86\frac{1}{2}$ feet; thence northeasterly 113 feet, more or less, to a point on the Easterly line of said Government Lot 2 which is 134 feet northerly from the southeast corner of said Government Lot 2; thence southerly along the easterly line of said Government Lot 2, 134 feet to the southeast corner of said Government Lot 2, thence west, along the south line of said Government Lot 2, to the point of beginning.

The following defendants claim interest in the following described land: George W. Willis and Grace F. Willis, husband and wife, Potlatch Commercial Terminal Company, a corporation. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland, and extending to the line of extreme low tide: Beginning at the intersection of the south line of said Government Lot 2 with the easterly right-of-way line of Primary State Highway No. 9 (Olympic Highway); thence east along the south line of said Government Lot 2, to a point thereon which is 172 feet east from the center line of the existing pavement of said State Highway; thence due North $86\frac{1}{2}$ feet; thence northeasterly 113 feet more or less; to a point on the easterly line of said Government Lot 2 which is 134 feet northerly from the southeast corner of said Government Lot 2; thence northerly, along the easterly line of said Government Lot 2, 80 feet; thence westerly to a point on the easterly right-of-way line of said Primary State Highway No. 9 (Olympic Highway), which is 101 feet northerly thereon from the point of beginning; thence following along the easterly right-of-way line of said State Highway and in a southerly direction to the point of beginning.

The following defendants claim interest in the following described land: John W. Phillips and Jean S. Phillips, husband and wife, Potlatch Commercial Terminal Company, a corporation, Seattle

First National Bank. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the following described upland, and extending to the line of extreme low tide: A tract of land situated in Government Lot 2, and being a part of Indian Lot or Tract No. 2 in said Government Lot 2, Section 26, Township 22 North, Range 4 West, W.M., particularly described as follows: Beginning at a point on the south line of said Government Lot 2, which is 172 feet east from the center line of the existing pavement of Primary State Highway No. 9 (Olympic Highway); thence due north $86\frac{1}{2}$ feet; thence northeasterly 113 feet, more or less, to a point on the easterly line of said Government Lot 2, which is 134 feet northerly from the southeast corner of said Government Lot 2; thence southerly, along the Easterly line of said Government Lot 2, 134 feet to the southeast corner of said Government Lot 2, thence west, along the south line of said Government Lot 2, to the point of beginning.

The following defendants claim interest in the following described land: Phoenix Logging Company, Potlatch Commercial and Terminal Company, a corporation. All that portion of the following described tidelands, as may lie in front of, adjacent to or abutting upon the Government Meander line of Government Lot 3, Section 26, Township 22 North, Range 4 West: All tidelands and shorelands of the second class, formerly owned by

the State of Washington, situate in front of, adjacent to or abutting upon the Government Meander line and extending to the line of extreme low tide, as follows: Beginning at the meander corner to fractional sections twenty-three (23) and twenty-four (24), Township twenty-two (22) north, range four (4) west, W.M., and running thence south $33\frac{1}{4}^{\circ}$ west, 4.20 chains; south $60\frac{1}{4}^{\circ}$ west, 6.80 chains; south 67° west, 3.90 chains; south $70\frac{1}{4}^{\circ}$ west, 13.50 chains; south 40° west, 10.30 chains; south 4° east, 9.00 chains; south 8.00 chains and south $36\frac{1}{4}^{\circ}$ east, 4.00 chains to the terminal point of this description, with a frontage of 59.70 lineal chains.

The following defendants claim interest in the following described land: C. H. Everett and Lillian Everett, husband and wife, Potlatch Commercial and Terminal Company, a corporation, Walter C. Asen and Lorraine Asen. All tidelands of the second class in front of, adjacent to or abutting upon that part of Tract One A of Lot 3, Section 26, Township 22 North, Range 4 West, W.M., measured along the meander line as follows: Beginning at the meander corner to fractional Sections 23 and 26, Township 22 North, Range 4 W., W.M., and running thence south $33\frac{1}{4}^{\circ}$ west 4.20 chains; south $60\frac{1}{4}^{\circ}$ West 6.80 chains; south 67° West 3.90 chains; south $70\frac{1}{4}^{\circ}$ West 13.50 chains; south 4° West 10.30 chains; south 4° East 9.00 chains; south 8 chains and south $36\frac{1}{4}^{\circ}$ east 4.00 chains to the true point of beginning of this de-

scription; thence south $36\frac{1}{4}^{\circ}$ east 4.89 chains more or less to the intersection of the south line of said Tract One A with the meander line and the terminal point of this description with a frontage of 4.89 lineal chains more or less measured along the meander line.

The following defendants claim interest in the following described land: Luella L. Greeley, F. G. Chapman. All tidelands of the second class formerly owned by the State of Washington, as defined by Section 1 of Chapter 36 of the Session Laws of 1911, situate in front of, adjacent to or abutting upon the following described upland: The north one-third ($\frac{1}{3}$) of Indian Tract No. 1-B in Government Lot three (3), Section twenty-six (26), Township twenty-two (22) North, Range four (4) West, W.M., (being a portion of Indian Tract No. 9-B Jennie Pulsifer allottee), and being the north one-third of a tract of land conveyed by Thomas Pulsifer, sole heir of Jennie Pulsifer, deceased Skokomish allottee, No. 9-B L.H. 43315-14 of the Skokomish Indian Reservation, a non-competent Skokomish Indian, to F. G. Chapman, the deed being recorded in Volume 45 of Deeds, page 247. Except, all tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the south twenty (20) feet of the above described upland.

The following defendants claim interest in the following described land: Carl J. Macke and Flor-

ence Macke, husband and wife, F. G. Chapman.

Parcel 1: All second class tidelands lying in front of, adjacent to or abutting upon the following described upland: the north one-half of the south two-thirds of Tract 1-B of Lot Three in Section twenty-six in Township twenty-two north, Range four West of W.M., excepting Olympic Highway right-of-way, excepting area conveyed to City of Tacoma, and excepting all ditches and canals constructed by authority of the United States, it being understood that this deed conveys the central or middle one-third of a tract to above grantors by deed recorded in Book 45 of Deed records of Mason County, at page 247 thereof, and subject thereto.

Parcel 2: All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon the south twenty (20) feet of the following described upland: The North one-third ($\frac{1}{3}$) of Indian Tract No. 1-B in Government Lot three (3), Section twenty-six (26), Township twenty-two (22) north, range four (4) west, W.M., (being a portion of Indian Tract No. 9-B, Jennie Pulsifer allottee), and being the north one-third ($\frac{1}{3}$) of a tract of land conveyed by Thomas Pulsifer, sole heir of Jennie Pulsifer, deceased Skokomish allottee, No. 9-B L.H. 43315-14 of the Skokomish Indian Reservation, a non-competent Skokomish Indian to F. G. Chapman, the deed being recorded in Volume 45 of Deeds, page 247.

The following defendants claim interest in the following described land: F. G. Chapman and Bertha A. Chapman, husband and wife. All tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon Tract 1-B, Lot 3, Section 26, Township 22 North, range 4 West, W.M., with a frontage of 5.36 lineal chains, more or less, measured along the meander line according to a certified copy of the government field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington. Except: All tidelands of the second class in front of, adjacent to or abutting upon the following described upland: The North one-third of Tract 1-B of Lot Three, in Section twenty-six, Township twenty-two North, Range Four West of W.M. Also excepting—All tidelands of the second class, lying in front of, adjacent to or abutting upon the following described upland: The North One-Half of the South Two-Thirds of Tract 1-B of Lot Three in Section Twenty-six in Township Twenty-two North, Range Four West of W.M.

The following defendants claim interest in the following described land: Fred Hanson, Wallace O. Hanson, Buster F. Hanson, Olympia F. Kern, Agnes Granger, Alice Hanson. All tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the south half of tract 2, lot 3, section 26, township 22 north, range 4 west, W.M., with a frontage of 5.06 lineal chains, more or less, measured along

the government meander line. All tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon that part of Lot 4, section 26, township 22 north, range 4 west, W.M., measured along the meander line as follows: Beginning at the meander corner to fractional sections twenty-six (26) and thirty-five (35) Township twenty-two (22) north, range four (4) west W.M., and running thence N 20° E 4.60 chains, N 80° E 8.10 chains and N 42° E 3.80 chains to the true point of beginning of this description; thence running N 5° W 9.00 chains and N 9° west 2.56 chains more or less, to the point of intersection of the north line of said lot four (4) with said meander line with a frontage of 11.56 lineal chains, more or less, measured along the meander line according to a certified copy of the Government field notes on the survey on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The following defendants claim interest in the following described land: The Casco Company, a Washington corporation, Millard Lemon, J. T. Thacker, Lola F. Falknor, A. J. Falknor, Annie P. Thacker, Fred Barnes, Wanda Barnes, N. Ward, Frank Ward, Sidney Ward, Lawrence Ward. All tidelands of the second class, as conveyed by the State of Washington, situate in front of, adjacent to or abutting upon that portion of the government meander line, and extending to the line of extreme low tide, described as follows: Beginning

at the meander corner to fractional sections 26 and 35, township 22 North, range 4 West, W.M., and run thence with the meanders in front of Lot 4, Section 26, as follows: North 20° East 4.60 chains; North 80° East 8.10 chains; North 42° East 3.80 chains to the terminal point of this description and having a total frontage of 16.50 lineal chains, more or less, measured along the meander line, according to a certified copy of the government field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The Casco Company, a Washington corporation, A. J. Falknor, Millard Lemon, State of Washington, Annie P. Thacker. All tidelands of the second class suitable for the cultivation of oysters described by meets and bounds as follows, to-wit: Beginning at corner #1, a stake identical with the meander corner to fractional sections 26 and 35, township 22 north, range 4 west of W.M., marked and witnessed as described in the government field notes; thence south 16 deg. 20' west 7.03 chs. to corner #2, a stake identical with the N.E. corner of the Skokomish Indian Reservation in said section 35; thence S. 9 deg. 50' east 3.04 chs. to corner #3; thence S. 16 deg. 00' west 9.72 chs. to corner #4, whence a stake bears west 52 links distant; thence S. 16 deg. 00' E. 5.01 chs. to corner #5; thence S. 16 deg. 30' W. 4.91 chs. to corner #6; thence S. 32 deg. E. 11.85 chs. to corner #7, whence a stake and mound of stone bears S. 48 deg.

11' W. 51 links distance; thence S. 51 deg. 00' E. 23.91 chs. to corner #8, whence a post and mound of stone bears S. 50 deg. 25' E. 8.10 chs. distant; also the northeast corner of lot 22 in said section 35 bears S. 48 deg. 06' E. 20.21 chs. distant; thence S. 54 deg. 00' E. 6.52 chs. more or less, to intersection with the north boundary of State Oyster Reserve, and corner #9; thence east along the north boundary line of said Oyster Reserve 8.50 chs. to corner #10; thence N. 53 deg. 01' W. 4.97 chs. more or less, to corner #11, whence the northeast corner of lot 22 heretofore described, bears S. 23 deg. 21' E. 14.15 chs. distant; thence N. 49 deg. 02' W. 18.05 chs. to corner #12; thence N. 31 deg. 53' W. 23.02 chs. to corner #13; thence N. 11 deg. 29' W. 23.64 chs. to place of beginning, containing 46.302 acres, more or less, as shown by the plat and field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The following defendants claim interest in the following described land: State of Washington. A strip of land, same being all that part of the hereinafter described shorelands which lie west of a line drawn parallel to and 50 feet east of the center line of State Road No. 9 as said road is now surveyed over and across the following described property in the County of Mason, State of Washington:

Beginning at corner #1, a stake identical with the meander corner to fractional sections 26 and 35, Township 22 North, Range 4 West, W.M., marked

and witnessed as described in the Government Field Notes; thence South $16^{\circ} 20'$ West 7.03 chains to corner #2, a stake identical with the Northeast corner of the Skokomish Indian Reservation in said Section 35; thence South $9^{\circ} 50'$ East 3.04 chains to corner #3; thence South $16^{\circ} 00'$ West 9.72 chains to corner #4; whence a stake bears West 52 links distant; thence South $16^{\circ} 00'$ East 5.01 chains to corner #5; thence South $16^{\circ} 30'$ West 4.91 chains to corner #6; thence South $32^{\circ} 00'$ East 11.85 chains to corner #7; whence a stake and mound of stone bears South $48^{\circ} 11'$ West 51 links distant; thence South $51^{\circ} 00'$ East 23.91 chains to corner #8, whence a post and mound of stone bears South $50^{\circ} 25'$ East 8.10 chains distant; also the Northeast corner of Lot 22 in said Section 35 bears South $48^{\circ} 06'$ East 20.21 chains distant; thence South $54^{\circ} 00'$ East 6.52 chains, more or less, to intersection with the North boundary of State Oyster Reserve and corner #9; thence East along the North boundary line of said oyster reserve 8.50 chains to corner #10; thence North $53^{\circ} 01'$ West 4.97 chains, more or less, to corner #11; whence the Northeast corner of Lot 22 heretofore described bears South $23^{\circ} 21'$ East 14.15 chains distant; thence North $49^{\circ} 02'$ West 18.05 chains to corner #12; thence North $31^{\circ} 53'$ West 23.00 chains to corner #13; thence North $11^{\circ} 29'$ West 23.64 chains to place of beginning, containing 46.302 acres, more or less, as shown by the plat and field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The following defendants claim interest in the following described land: The Casco Company, a Washington corporation, A. J. Falknor, State of Washington. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon Lots 1 and 2, Section 35, Township 22 North, Range 4 West, W.M., with a total frontage of 19.39 lineal chains, more or less. Excepting those portions of the above described tidelands included in a tract of oyster land in front of said section 35, deeded by the State of Washington to A. J. Falknor, March 26, 1906, under application No. 3356.

The following defendants claim interest in the following described land: State of Washington, James J. Smith. The vacated State Oyster Reserve Plat No. 134 in front of Section 35, Township 22 North of Range 4 West, W.M., Mason County, Washington, described as follows:

Beginning at the meander corner on the south line of said Section 35 and running thence N. 20° W. 9.00 chains; thence N. 57° W. 14.00 chains; thence N. 64° W. 8.94 chains; thence East 8.74 chains; thence S. 77° 15' E. 13.04 chains; thence S. 53° E. 10.40 chains; thence South 11.00 chains and West 7.00 chains to the point of beginning and having an area of 22.68 acres.

The following defendants claim interest in the following described land: State of Washington. All tidelands situate in front of, adjacent to or abutting upon Government Lots 3, 4 and 5, Section

35, Township 22 North of Range 4 West, W.M., Mason County, Washington, except those portions of the above described tidelands included in the following oyster land tracts lying in front thereof:

1. Deeded to Homer Thacker, Lola Falknor and Jessie M. Hopkins, dated March 26, 1906, under Application No. 3513, recorded in Volume 9 O.L. page 21, records of Mason County, Washington.

2. Deeded to A. J. Falknor, dated March 26, 1906, under Application No. 3356, recorded in Volume 8 O.L. Page 334, records of Mason County, Washington.

3. Vacated Oyster Reserve Plat No. 134 (not conveyed, but vacated January 13, 1930).

The following defendants claim interest in the following described land: The Casco Company, a Washington corporation, Homer Thacker, Lola Falknor, Jessie M. Hopkins, State of Washington, Annie P. Thacker. All tidelands of the second class suitable for the cultivation of oysters described by metes and bounds as follows, to-wit:

Beginning at the initial point, corner #1, identical with the Southeast corner of the State Oyster Reserve Plat #134 and from which the meander corner to sections 2 and 35, township 21 and 22 north, range 4 West, W.M., bears west 7.00 chs. distant; thence from said initial point N. 89 deg. 10' E. 15.27 chs. to corner #2; thence S. 60 deg. east 6.44 chs. to corner #3; thence S. 63 deg. 30' E. 18.88 chs. to corner #4; thence N. 85 deg. E. 11.31 chas. to corner #5 from which the corner to Sections 1, 12, 6 and 7, township 21 north, range 3

and 4 west bears S. 24 deg. 13' E. 77.588 chs. distant; thence N. 43 deg. 15' W. 10.70 chs. to corner #6; thence N. 61 deg. 23' W. 14.719 chs. to corner #7; thence N. 88 deg. 36' W. 13.503 chs. to corner #8; thence N. 67 deg. 38' W. 16.504 chs. to corner #9; thence S. along the east line of State Oyster Reserve a distance of 11 chains to corner #1 and place of beginning, containing 39.61 acres, more or less, according to the map and field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

The following defendants claim interest in the following described land: State of Washington. All tidelands situate in front of, adjacent to or abutting upon Government Lot 1, Section 2 and Government Lots 1 and 2, Section 1, Township 21 North, Range 4 West, W.M., Mason County, Washington, except those portions of the above described tidelands included in the following oyster land tracts lying in front thereof.

1. Deeded to Homer Thacker, Lola Falknor and Jessie M. Hopkins, dated March 26, 1906, under Application No. 3513, recorded in Volume 9 O.L. Page 21, records of Mason County, Washington.

2. Vacated Oyster Reserve Plat No. 134 (not conveyed, but vacated January 13, 1930).

The following defendants claim interest in the following described land: Marcus Nalley and Frances Nalley, husband and wife, E. A. Sims, Charles T. Wright, Paul Hunter and Jane Doe

Hunter, his wife. All tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon Lot 3, Section 1, Township 21 North, Range 4 West, W.M., with a frontage of 12.50 lineal chains, more or less, measured along the government meander line (also known as Assessor's Tax #911).

The following defendants claim interest in the following described land: Marcus Nalley and Frances Nalley, husband and wife, Frank A. Robinson, City of Tacoma. All tidelands of the second class, formerly owned by the state of Washington, situate in front of, adjacent to or abutting upon Government Lot 4, Section 1, Township 21 North, Range 4 West, W.M., with a frontage of 25.74 lineal chains, more or less, measured along the Government meander line. (Also known as Assessor's Tax No. 899).

The following defendants claim interest in the following described land: State of Washington, City of Tacoma, Charles T. Wright, Paul Hunter and Jane Doe Hunter, his wife. All of the tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon Lots 1 and 2, Section 6, Township 21 North, Range 3 West, W.M., and the detached tidelands lying to the East of said Lot. (See note.)

Note: It is assumed that Lot 1 above described refers to Indian Lot 1 (being fractional Northwest Quarter of Southwest Quarter (NW $\frac{1}{4}$ SW $\frac{1}{4}$))

and that Lot 2 above described refers to Indian Lot 2 (being fractional Southwest Quarter of Southwest Quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 6, Township 21 North, Range 3 West, W.M.

The following defendants claim interest in the following described land: State of Washington. All of the tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to, or abutting upon Lot 1, Section 7, Township 21 North, Range 3 West, W.M., and the detached tidelands lying to the East of said lot. (See note.)

Note: It is assumed that Lot 1 above described refers to Indian Lot 1 (being in fractional Northwest Quarter of Northwest Quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 7, Township 21, North, Range 3 West, W.M.

The following defendants claim interest in the following described land: City of Tacoma, Charles T. Wright, Paul Hunter and Jane Doe Hunter, his wife.

A. Existing electric transmission line over and across all tidelands of the second class, formerly owned by the State of Washington, situate in front of, adjacent to or abutting upon Government Lot 4, Section 1, Township 21 North, Range 4 West, W.M., with a frontage of 25.74 lineal chains, more or less, measured along the Government meander line. (Also known as Assessor's Tax No. 899).

B. Existing electric transmission line over and

across all of the tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon Lot 1, Section 6, Township 21 North, Range 3 West, W.M., and the detached tidelands lying to the East of said Lot. (See note.)

Note: A portion of the above Electric Transmission Line and the right-of-way lies within the limits of a public shooting ground as laid out on detached tidelands in front of Government Lot 3 and Indian Lot 1, Section 6, Township 21 North, Range 3 West, W.M., and fully described.

The following defendants claim interest in the following described land: United States of America (Bonneville Power Administration), Charles T. Wright, Paul Hunter and Jane Doe Hunter, his wife. Right of way for electric transmission line over and across all of the tidelands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon Lot 1, Section 6, Township 21 North, Range 3 West, W.M., and the detached tidelands lying to the east of said lot. (See note.)

Note: The tideland plat in the Office of the Commissioner of Public Lands at Olympia, Wash., shows as follows: "R/W App. 17450, Bonneville Power Adm. rejected 5/23/45", adjacent to Indian Lot 1, Section 6, Township 21 North, Range 3 West, WM.

The following defendants claim interest in the following described land: State of Washington,

City of Tacoma, Charles T. Wright, Paul Hunter, and Jane Doe Hunter, his wife. The detached tidelands of the second class, owned by the State of Washington, included within the limits of a tract described as follows:

Beginning at a point in front of Section 6, Township 21 north, Range 3 West, W.M., which is S 44° 30' W 920 feet distant from the meander corner of the north line of said section and running thence S 40° 10' E 1073.5 feet, S 13° 10' W 1269.7 feet, S 74° 40' W 670 feet and S 27° 32' W 1125 feet to a point which is N 45° 50' E 1932 feet distant from the southwest corner of said section 6; thence N 90° 30' W 3530 feet and east 1960 feet to said point of beginning, containing an area of 104.68 acres according to the plat thereof on file in the Office of the Commissioner of Public Lands at Olympia, Washington. (Also known as Assessor's Tax #1176.)

XIII.

That the rights of the plaintiff herein, the Skokomish Indian Tribe, by virtue of the reservation granted to them in said Treaty of January 26, 1855, are paramount and superior to any right or to any title of whatsoever nature granted to the defendants hereinabove described, or to any rights in and to the lands described above, which lands are tidelands, and that the title of the plaintiff, the Skokomish Indian Tribe, in and to said tidelands as hereinabove described, should be quieted in said plaintiff, the Skokomish Indian Tribe, and the rights of the defendants and any persons claiming by,

through, or under them, should be forever barred and declared to be invalid and without any legal effect by any grant from the state of Washington.

Wherefore, plaintiff prays—

1. That this Court quiet title of said plaintiff in and to the above-described lands, and that the defendants herein be forever barred and estopped from claiming any right or title in and to said lands.

2. That this Court grant further and necessary relief to effect and remove said defendants from said lands and to determine and define the rights of the plaintiffs herein in and to said lands.

3. For such further and equitable relief that this Court may deem proper.

KENNETH R. L. SIMMONS and
EDWIN C. DAVIS,

/s/ By KENNETH R. L. SIMMONS,
KEITH & WINSTON,

/s/ By P. H. WINSTON,
Attorneys for Plaintiff.

[Endorsed]: Filed December 3, 1948.

[Title of District Court and Cause.]

STIPULATION

It is hereby Stipulated and Agreed that the above entitled action be dismissed as to the United States of America, therein named as a defendant, and that

an order of dismissal as to said defendant United States of America may be entered without costs to either party as against the other.

This stipulation is made upon the mutual understanding that the Bonneville Power Administration has no interest in the tract of land described on page 18 of plaintiff's complaint, which description by reference is made a part hereof; that heretofore an application was made to the Washington State Public Land Commissioner for a right-of-way easement over the bed of the Skokomish River and tide lands fronting Section 6, Township 21 North, Range 3 West, Willamette Meridian in Mason County, Washington, being application No. 17540, on February 21, 1942; that program readjustments due to war conditions caused said administration to abandon its plans for the construction of the line projected for said location and on April 23, 1945 the Washington State Public Lands Commissioner was notified that the Administration wished to withdraw its application, and that pursuant to said notice the said commissioner rejected said application by order dated May 23, 1945, and that accordingly the United States of America has no right, title, or interest in or to said premises, or any interest in the above entitled action.

Dated this 17th day of February, 1949.

/s/ LYLE KEITH,

/s/ P. H. WINSTON,

/s/ KENNETH R. L. SIMMONS,

Of Counsel for Plaintiff.

/s/ J. CHARLES DENNIS,
United States Attorney,

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

[Endorsed]: Filed February 18, 1949.

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS

The defendant, Chas. T. Wright, moves the court as follows:

I.

To dismiss the action or in lieu thereof to suspend the action on the ground that there is now pending a prior action in the Superior Court of the State of Washington in and for the County of Mason.

That this amended motion is based upon attached Summons and Complaint certified by the County Clerk of Mason County, State of Washington, and the files and records of this action.

B. FRANKLIN HEUSTON,
GLENN E. CORREA,
J. W. GRAHAM,

/s/ By B. FRANKLIN HEUSTON,
Of Counsel for Defendant,
Chas. T. Wright.

[Endorsed]: Filed February 21, 1949.

[Title of District Court and Cause.]

ORDER DISMISSING U.S.A.
AS PARTY DEFENDANT

This matter coming on this 17th day of March, 1949, upon application of defendant, United States of America for an order dismissing said United States of America as a party defendant, and it appearing to the court from the stipulation herein filed by counsel for plaintiff, and for defendant, U.S.A., that the United States of America has no interest in the property described in plaintiff's complaint, and is not a proper or necessary party to this action, and that the same should be dismissed as to the United States of America, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the above entitled action be and the same hereby is dismissed as to the United States of America, without cost to either party as against the other.

Done in Open Court this 17th day of March, 1949.

/s/ JOHN C. BOWEN,
United States District Judge.

Approved:

/s/ LYLE KEITH,
/s/ P. H. WINSTON,
/s/ KENNETH R. L. SIMMONS,
Of Counsel for Plaintiff.

Presented by:

/s/ GUY A. B. DOVELL,

Assistant United States Attorney,

/s/ J. CHARLES DENNIS,

United States Attorney.

[Endorsed]: Filed March 17, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now defendants F. G. Chapman and Bertha A. Chapman, and move the court to dismiss the above entitled action on the following grounds, to wit:

1. That another action is pending between the same parties for the same cause in the Superior Court of the State of Washington for Mason County.

2. That the complaint does not state facts sufficient to constitute a cause of action against the said defendants.

3. That the plaintiff has been guilty of laches and has thereby waived any rights it may at any time have claimed or possessed.

4. That the State of Washington, predecessor in interest of defendants, has been in open, notorious, exclusive and continuous possession of the tide lands involved in this action under a claim of own-

ership for a period of over 60 years as a state, and prior thereto as a territory and that said possession and claim of ownership has been adverse to the plaintiff.

6. That the action has not been commenced within the time limited by law.

/s/ J. W. GRAHAM,

Attorney for Defendants Chapman.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEARANCE

To: The Skokomish Indian Tribe, Plaintiff, and to
Kenneth T. L. Simmons, Edwin C. Davis, Lyle
Keith and P. H. Winston, plaintiff's attorneys:

You, and Each of You, are hereby notified that the above named defendant, State of Washington, hereby enters its appearance in the above entitled action by and through its attorneys, Smith Troy, Attorney General, T. H. Little, Chief Assistant Attorney General, and E. P. Donnelly, Assistant Attorney General, and requests that all further pleadings herein be served upon said defendant at the office of the Attorney General in the Temple of Justice, Olympia, Thurston County, Washington.

Dated this 9th day of May, 1949.

/s/ SMITH TROY,

Attorney General,

/s/ T. H. LITTLE,

Chief Assistant Attorney General,

/s/ E. P. DONNELLY,

Assistant Attorney General.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 14, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the above named defendants, Marcus Nalley and Frances Nalley, husband and wife, and move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against these defendants upon which relief can be granted.

2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter of the action and the person of the plaintiff in that there is no allegation that the amount actually in controversy between the plaintiff and these defendants exceeds, exclusive of interest and costs, the sum of \$3,000.00, and because the plaintiff does not have capacity to sue and maintain the action, in that plaintiff is an Indian tribe and is not repre-

sented by the Government of the United States of America and is not represented by the United States District Attorney as is required by law.

/s/ S. W. Z. HENDERSON,
HENDERSON, CARNAHAN &
THOMPSON AND H. C.
PERKINS,

Attorneys for defendants, Marcus Nalley and Frances Nalley, husband and wife.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 17, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants Ernest Worl and Beulah Worl, his wife, John W. Phillips and Jean S. Phillips, his wife, Allen M. Strine, Walter Asen and Lorraine Asen, his wife, Ernest Carlson and Hulda S. Carlson, his wife, Seattle First National Bank of Shelton, Washington, George W. Willis and Grace F. Willis, his wife, Carl J. Macke and Florence Macke, his wife, George F. Wolf and Vivian A. Wolf, his wife, Luella L. Greeley and Daniel R. Doran and Florence Doran, his wife, by their attorneys, and move this Court to dismiss the action on the following grounds:

I.

The complaint fails to state a claim against said

defendants or any of them upon which relief can be granted.

II.

This Court lacks jurisdiction over the subject matter of the action.

III.

This Court lacks jurisdiction over said defendants in this action.

IV.

Plaintiff lacks capacity to bring this action.

V.

The complaint shows on its face that the action was not brought within the time limited by law.

Dated this 20th day of December, 1949.

SKEEL, McKELVEY, HENKE,
EVENSON & UHLMANN,

/s/ By ROBERT S. IVIE,

Attorneys for above-named
Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 28, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant State of Washington moves that the court enter an order dismissing the cause of action as to the State of Washington on the following ground:

1. The court possesses no jurisdiction over the State of Washington.

We have attached Memorandum Brief.

/s/ SMITH TROY,
Attorney General,
/s/ E. P. DONNELLY,
Assistant Attorney General,
/s/ ROBERT A. COMFORT,
Assistant Attorney General,
Attorneys for the State of
Washington.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

MEMORANDUM BRIEF IN FAVOR OF RESPONDENT STATE OF WASHINGTON'S MOTION TO DISMISS

The Eleventh Amendment to the Constitution of the United States reads as follows:

“The judicial power of the United States shall not be construed to extend to any suit in

law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state."

Because of this amendment the Federal courts are without jurisdiction to entertain a suit instituted by private parties against a state in the absence of any consent by the state. *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U. S. 459, 89 L. ed. 389, 65 S. Ct. 347.

The Skokomish Indians are citizens of the United States and of the State of Washington. See Title 8, section 601, p. 597, U.S.C.A. Though the Eleventh Amendment only explicitly refers to "citizens of another state or * * * citizens or subjects of any foreign state," it also applies to a suit brought against a state by one of its own citizens. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 S. Ct. 504; *Ex Parte Young*, 209 U. S. 123, 150, 52 L. ed. 714, 28 S. Ct. 441. In the former case, the plaintiff, a citizen of Louisiana, was suing his home state in a Federal court. The Supreme Court held that even though a case arises under the Constitution and Laws of the United States, the Circuit (now District) Court was without jurisdiction to entertain a suit maintained by a citizen against his own state. By analogy, even though the case at bar arises under a treaty of the United States, this court is without jurisdiction to entertain the suit for it is brought by a party against his own state.

Nor does the fact that the plaintiff has been in-

corporated under Federal law confer jurisdiction upon this court. The same principle that protects states against suits in a Federal court by citizens of that state, also prohibits the institution of suits in a Federal court by a Federal corporation against a state. In the case of *Principality of Monaco v. Mississippi*, 292 U. S. 313, 78 L. ed. 1282, 54 S. Ct. 745, on page 329 of the U. S. Reports the following appears:

“The states, in the absence of consent are immune from suits brought by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment.”

The right of private parties to sue a state lies not in the Constitution or Laws of the United States, but can only come from the consent of the state. *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108, 39 S. Ct. 16. The State of Washington has not consented to this suit. Laws of 1895, p. 188, section 1, as amended by Laws of 1927, p. 331, section 1 (Rem. Rev. Stat. 886), reads in part as follows:

“* * * actions * * * to determine or quiet title to, any real property in which the State of Washington is a necessary or proper party defendant may be commenced and prosecuted to judgment against the state in the superior court of the county in which such real property is situated, * * *.” (Emphasis supplied.)

Patently, the Washington legislature contemplated the institution of suits against the state in state

courts and did not authorize the institution of such suits in a Federal court. This statute waiving the State of Washington's immunity from suit cannot be construed as waiving the immunity from suit in a Federal court. *Ford Motor Company v. Department of Treasury of the State of Indiana*, *supra*.

The principles of law above cited are well established. It is felt by the defendant State of Washington that they sufficiently support the contention that the plaintiff's case should be dismissed as to the State of Washington.

Respectfully submitted,

SMITH TROY,
Attorney General,
E. P. DONNELLY,
Assistant Attorney General,
ROBERT A. COMFORT,
Assistant Attorney General,
Attorneys for the State of
Washington.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS OF DEFENDANTS
SIMPSON LOGGING COMPANY, ET AL.

Come now the defendants Simpson Logging Company, for itself and as the successor to the defendant Phoenix Logging Company, and Frances C.

Simpson, heir of George Simpson, deceased, and move the Court to dismiss the action above entitled upon the following grounds:

I.

The complaint fails to state claim against said defendants or any of them upon which relief can be granted.

II.

This Court lacks jurisdiction of the subject matter of the action.

III.

This Court lacks jurisdiction over said defendants in this action.

IV.

Plaintiff lacks capacity to bring this action.

V.

The complaint shows on its face that the action was not brought within the time limited by law.

VI.

The plaintiff has been guilty of laches and has waived any rights it may have at any time possessed in the matter.

Dated this 14th day of May, 1951.

/s/ WILLIAM D. ASKREN,

RYAN, ASKREN & MATHEWSON,

Attorneys for said Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER DENYING MOTIONS TO DISMISS COMPLAINT

The plaintiff, in its complaint filed herein December 3, 1948, alleges that it is an Indian Tribe duly incorporated and acting pursuant to its corporate charter and constitution and by-laws and has authorized its attorneys to bring this action. Jurisdiction of this court is alleged to arise from the fact that plaintiff is an incorporated Indian Tribe and that the rights desired to be protected arise out of an Indian Treaty and that the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000. The complaint further alleges the Treaty with the Indians under date of January 26, 1855, which Treaty included the Skokomish Indian Tribe. It also alleges the Executive Order of February 25, 1874 by which President Grant set aside the present Skokomish Indian Reservation at the head of Hood's Canal. The complaint further alleges that by virtue of the Executive Order of February 25, 1874 the uplands therein described, together with the shorelands in the Hood's Canal, became and were at all times reserved to the exclusive use, benefit and occupancy of the Skokomish Indian Tribe with the exclusive right, as guaranteed by said Treaty, to fish in all the waters bordering upon the reservation, including the tidal waters thereof which border upon and touch said reserva-

tion. The complaint further alleges that the exclusive right of fishing was to be free from interference from the State of Washington, or any person claiming under or by virtue of any title granted them by the State of Washington and subject only to the exclusive jurisdiction of the United States.

It is further alleged that the State of Washington has granted certain rights to the defendants thereafter named as to certain tidelands described therein which border upon the Skokomish Indian Reservation, and alleges various specific defendants and their specific ownership which conflicts with the reserved rights of plaintiff. The complaint prays that the title to the tidelands bordering the Skokomish Indian Reservation be quieted in plaintiff, that defendants be forever barred and estopped from claiming any right or title in and to said lands, that the court grant necessary relief to remove said defendants from said lands and define the rights of plaintiff in and to said lands, and for such further and equitable relief as the court may deem proper.

The City of Tacoma, one of the named defendants, filed an answer herein on September 8, 1949 delineating its title and praying that plaintiff's complaint be dismissed and that defendant recover costs. This is the only answer filed herein on behalf of any of the specific defendants. Numerous of the defendants have filed motions to dismiss the action herein. The challenges to the complaint may be summarized as hereafter set forth.

Jurisdiction

Since this action involves the interpretation of an Indian Treaty and of an order of the President creating an Indian Reservation it would seem elementary that the district court of the United States has jurisdiction.

Objection is made to the amount in controversy on the ground that the actual value of the various holdings of the several defendants is in many instances less than \$3,000. However, what the plaintiff is seeking is to secure title to all the tidelands in front of or bordering on the Skokomish Indian Reservation. The value of such tidelands certainly exceeds \$3,000. Therefore the court would appear to have jurisdiction in the event that judgment is hereafter given for the plaintiff to put into effect the incidents of such judgment, such as removing specific defendants from their tidelands.

Plaintiff's Capacity to Sue

Plaintiff alleges that it is duly incorporated under an Act of Congress, naming the Act, and that all things necessary to be done have been done to entitle plaintiff to bring this action.

Action in the Superior Court of the State of Washington for Mason County

The defendant, Charles T. Wright, in his amended motion to dismiss, moves this court for a dismissal of this action or in lieu thereof a suspension of same on the ground that there is now pend-

ing a prior action (filed July 30, 1948) in the Superior Court of the State of Washington for Mason County. Copy of the state court complaint attached to such amended motion discloses that the action was brought by Charles T. Wright and that the Skokomish Indian Tribe is named as a party defendant. The issues raised in the complaint in the state court case are not identical with the issues raised herein and there is nothing in the file to show that plaintiff herein has filed an answer in the state court case raising the same issues as are raised herein. This court cannot presume that the issues in the Wright case will be the same. Therefore, there would appear to be no reason to justify this court's refusing jurisdiction in favor of the Wright case nor holding the action herein in abeyance until the completion of the state court case.

State of Washington

The State of Washington has moved to dismiss on the ground the court has no jurisdiction over it and has filed a brief in support of such position, claiming that it has not consented to this suit and that under the laws of this state an action to quiet title to any property in which the state is a necessary or proper party defendant may be commenced and prosecuted against the state "in the superior court of the county in which such real property is situated," which the state contends cannot be construed as waiving its immunity from suit in a federal court.

Plaintiff's complaint alleges the execution of the Indian Treaty on January 26, 1855 and of the Executive Order of President Grant on February 25, 1874. The State of Washington did not come into being until 1889. Under the second subdivision of Section 4 of the Enabling Act and Article 26 of the state constitution the state forever disclaimed "all right and title * * * to all lands lying within said limits owned or held by any Indian or Indian tribes * * *." Therefore, if plaintiff is to prevail it must prevail upon a title which antedated statehood by some fifteen years. Compare *Taylor v. United States*, 44 F. 2d 531, certiorari denied 283 U.S. 820, with *Moore v. United States*, 157 F. 2d 760, affirming 62 F. Supp. 660, certiorari denied 330 U.S. 827, to note the effect which statehood might have upon this question. Moreover, it is to be noted that in practically every case which has arisen within the limits of the State of Washington involving a claim by an Indian Tribe either to ancient fishing grounds or to the ownership of tidelands or the construction of such Treaties and Presidential orders as those involved herein, the State of Washington has been a party and no reported opinion can be found wherein the State of Washington has been dismissed upon the ground urged by the state herein. *United States v. O'Brien*, 170 Fed. 508, *United States v. Stotts*, 49 F. 2d 619.

Moreover, the state is a proper party defendant in an action involving "ancient fishing grounds" of Indians.

Laches

The general rule is that rights of Indians are not subject to the ordinary provisions of law either as to statutes of limitations or laches. *United States v. Moore*, *supra*. The decision herein is made upon motions to dismiss only. The record is completely silent as to any facts herein which might conceivably have a bearing upon the question of laches. The court cannot infer facts where none are pleaded. Irrespective of what the court's decision might be when all the facts are in the record it would appear that at the present time nothing in the record herein would warrant this court in overruling the long line of authorities to the effect that neither laches nor the statute of limitations run against Indians asserting alleged rights under facts comparable with those herein.

Therefore, the motions to dismiss of Fred Hanson, E. L. France, Trustee, Estate of E. S. Avey, Mabel V. Avey, Minnie E. Watson, W. H. France, Jane Doe France, E. L. France and Leo B. France, F. G. Chapman and Bertha A. Chapman, Marcus Nalley and Frances Nalley, husband and wife, Ernest Worl and Beulah Worl, his wife; John W. Phillips and Jean S. Phillips, his wife; Allen M. Strine; Walter Asen and Lorraine Asen, his wife; Ernest Carlson and Hulda S. Carlson, his wife; Seattle First National Bank of Shelton, Washington; George W. Willis and Grace F. Willis, his wife; Carl J. Macke and Florence Macke, his wife; George F. Wolf and Vivian A. Wolf, his wife;

Luella L. Greeley; and Daniel R. Doran and Florence Doran, his wife, State of Washington, Simpson Logging Company for itself and as the successor to the defendant, Phoenix Logging Company, and Frances C. Simpson, heir of George Simpson, deceased, Paul Hunter and Mary Hunter, husband and wife, and each of them, are hereby denied. The amended motion to dismiss of Charles T. Wright is likewise denied.

Dated this 16th day of July, 1952.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed July 29, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR LACK OF PROSECUTION

Comes now, Chas. R. Lewis, attorney for Paul Hunter and Mary Hunter, husband and wife, and moves the Court to dismiss the above entitled action for failure of Plaintiff to prosecute diligently. Plaintiff relies on affidavit of Chas. R. Lewis, hereto attached for granting of this motion.

/s/ CHAS. R. LEWIS,
Attorney for Paul Hunter and Mary Hunter, husband and wife.

[Endorsed]: Filed February 10, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant Charles T. Wright, by and through his attorneys of record herein, and moves the court to dismiss this action for failure of the plaintiff to prosecute the action herein.

This motion is based upon the records and files herein and the annexed affidavit.

J. W. GRAHAM,
B. FRANKLIN HEUSTON and
GLENN E. CORREA,

/s/ By GLENN E. CORREA,
Attorneys for Charles T. Wright.

United States of America,
Western District of Washington,
County of Mason—ss.

Glenn E. Correa, being first duly sworn, on oath deposes and says:

That he is one of the attorneys of record herein for the defendant, Charles T. Wright, and makes this affidavit in support of said defendant's motion to dismiss this action for failure of the plaintiff to prosecute this action in accordance with existing law and procedure, and in particular Rule 41(b) of the Federal Rules of Civil Procedure.

This action was commenced by service of Summons and Complaint, the same being under Civil Action No. 1183 in this court and dated December

20, 1948; that the defendant, Charles T. Wright, duly appeared in this action and on or about January 25, 1949, served upon the attorneys for plaintiff a motion to dismiss. That on or about February 19, 1949, the defendant, Charles T. Wright, served an amended motion upon the plaintiff's attorneys, Davis, Keith and Winston and Kenneth R. L. Simons, 1121 Paulsen Building, Spokane, Washington; that on or about February 19, 1949, defendant, Charles T. Wright, was notified by the Clerk of this Court that Judge Leavy had disqualified himself and had transferred this action to the Northern Division in Seattle for all purposes.

On October 30, 1950, this defendant received a Motion and Notice of Hearing on Motion to Add additional parties defendant by the plaintiff, such hearing being noted for the 13th day of November, 1950; or or about April 3, 1951, the attorneys for plaintiff notified Mr. Heuston, that defaults had been taken against almost all of the defendants and further indicating that the plaintiff was to pursue the action to a conclusion; after considerable delay, Judge William J. Lindberg entered an order dated July 16, 1952 denying motions to dismiss the complaint.

That on or about August 5, 1952, the defendant, Charles T. Wright, served and filed his answer herein. A pre-trial date of March 26, 1953 and trial date of April 1, 1953, was set by Judge Lindberg, but upon motion of W. E. Evenson, attorney for other defendants in this action, these dates were

set aside. Judge Lindberg then made and entered a Notice of Call Calendar for May 5, 1953, but this case was passed on that call calendar due to death of Kenneth R. L. Simmons, one of the attorneys for plaintiff, and the case setting of this action was reset for August 31, 1953. On July 7, 1953, a Notice of Call Calendar was made by for July 14, 1953, for the U. S. District Court, Western District of Washington, Southern Division at Tacoma, under cause No. 1183. The defendant, Charles T. Wright, appeared at that call calendar, by the undersigned attorney, along with other counsel for defendants; it appearing that the plaintiff or its counsel were not present at this call calendar, the matter was passed by the court.

This action has been pending for several years, as above set forth in detail, and the plaintiff has made little effort to get this case set for trial; the title to the defendants' property, as described in the complaint, has been clouded by virtue of this action, and unless the action is finally, promptly and completely adjudicated or dismissed, a hardship or inconvenience could and does exist by reason of the pendency of this action. That plaintiff has had ample and sufficient time to litigate this case and to have same set for trial, and any further continuance of this action would be contrary to rules of procedure of this court and is potentially prejudicial to the property rights of this moving defendant. This action should either be set for trial at an early and certain date or be dismissed in accordance with existing rules of procedure.

/s/ GLENN E. CORREA.

Subscribed and Sworn to before me this 6th day of February, 1954.

[Seal] /s/ B. FRANKLIN HEUSTON,
Notary Public in and for the State of Washington,
residing at Shelton.

[Endorsed]: Filed February 10, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants, E. L. France, Trustee, Estate of E. S. Avey, Mabel V. Avey, Minnie E. Watson, W. H. France, Jane Doe France, E. L. France and Leo B. France, move the Court to dismiss the above entitled action for failure of the plaintiff to prosecute with due diligence.

/s/ JOHN L. MILLER,
Attorney for Above Named
Defendants.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

MOTION

Come now the defendants E. L. France, Trustee, Wallace O. Hanson, Buster F. Hanson, Olympia F. Kern, Agnes Granger and Alice Hanson, and move

the court that the above action be dismissed on the following ground, to wit:

That the said action has not been prosecuted diligently.

That for 5 years or more the said action has constituted a cloud upon the title to the tide lands owned by the said defendants.

/s/ J. W. GRAHAM,

Attorney for said Defendants.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, City of Tacoma, respectfully moves the above-entitled Court to dismiss this action for failure of the plaintiff to prosecute its case with due diligence.

CLARENCE M. BOYLE,

DEAN BARLINE,

FRANK L. BANNON,

W. L. BROWN, JR.,

PAUL J. NOLAN,

ALLAN R. BILLET,

/s/ By W. L. BROWN, JR.,

Attorneys for City of Tacoma.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF
MOTION TO DISMISS

State of Washington,
County of Pierce—ss.

W. L. Brown, Jr., being first duly sworn, on oath deposes and says: that he is one of the attorneys of record in the above-entitled matter for the City of Tacoma, a municipal corporation, defendant; that on or about the 20th day of December, 1948, summons was issued in the above-entitled matter and the same was served on the defendant herein named on the 14th day of May, 1949, five months and 25 days from the date of issuance of said summons; that on or about the 17th day of May, 1949, appearance was made by said defendant and served on attorneys for the plaintiff and filed in this Court; that thereafter the plaintiff failed to diligently prosecute its cause of action, without fault of the defendant herein named; that this matter was set for April 1, 1953, but was continued, due to no fault of the defendant City of Tacoma, and that since that time the plaintiff has not been represented at the various calls of the calendar on which this matter was scheduled; further that the plaintiff has taken no steps to bring the matter to trial; affiant believes that this case should be dismissed for failure to prosecute.

/s/ W. L. BROWN, JR.

Subscribed and sworn to before me this 19th day of February, 1954.

[Seal] /s/ IRENE D. STRONG,
Notary Public in and for the State of Washington,
residing at Tacoma.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

MOTION

Comes now defendant State of Washington and moves this Honorable Court that this action be dismissed as against the State of Washington, on the ground that this Court has no jurisdiction, the state not having consented to be sued or waived its immunity from suit.

In the event this motion is denied, without waiving the same, the State of Washington moves this action be dismissed for want of diligent prosecution.

/s/ DON EASTVOLD,
Attorney General,
/s/ E. P. DONNELLY,
Assistant Attorney General,
Attorneys for Defendant,
State of Washington.

[Endorsed]: Filed February 20, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR
WANT OF PROSECUTION

Come now the defendants Ernest Carlson et al. by their undersigned attorneys and hereby join in all of the several pending motions to dismiss for want of prosecution made by other defendants herein.

SKEEL, McKELVEY, HENKE,
EVENSON & UHLMANN,

/s/ By W. E. EVENSON,
Attorneys for Defendants
Carlson et al.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 23, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AND SETTING FOR TRIAL AND PRE-
TRIAL CONFERENCE

This matter having come on regularly for hearing before the Hon. George Boldt, Judge of the above entitled Court on February 23, 1954, at Tacoma, Washington, upon the February, 1954, Term Call Calendar and upon the motions of the appearing defendants, to dismiss the above entitled cause for failure of the plaintiff to prosecute the action, the plaintiff appearing by one of its attorneys,

P. H. Winston; the defendant, Charles T. Wright, appearing by one of his attorneys, Glenn E. Correa; the defendant, State of Washington, appearing by one of its attorneys, E. P. Donnelly; the defendants, E. L. France, Trustee, Wallace O. Hanson, Buster F. Hanson, Olympia F. Kern, Agnes Granger and Alice Hanson, appearing by their attorney, J. W. Graham (represented in court by Mr. Correa); the defendants, E. L. France, Trustee, Estate of E. S. Avey, Mabel V. Avey, Minnie E. Watson, W. H. France, Jane Doe France, E. L. France and Leo B. France, appearing by their attorney, John L. Miller (represented in Court by Mr. Correa); the defendants, Paul Hunter and Mary Hunter appearing by their attorney, Chas. R. Lewis, (represented in Court by Mr. Correa), the defendants, Ernest Carlson, Hulda S. Carlson, Walter Asen, Lorraine Asen, John W. Phillips, Jean S. Phillips, Ernest Worl, Beulah Worl, George W. Willis, Grace F. Willis, Allen M. Strine, Carl J. Macke, Florence Macke, Seattle First National Bank, Daniel R. Doran, Florence Doran, George F. Wolf, Vivian A. Wolf, Lucella L. Greely, Ralph Alexander and Adeline T. Alexander, being represented by one of their attorneys, W. E. Evenson, and the defendant, City of Tacoma, represented by one of its attorneys, W. L. Brown, Jr., the Court having first heard the argument of counsel in support of the motions to dismiss and having considered a trial date and pretrial conference date, and being in all respects fully advised in the premises, now, therefore it is

Ordered that each and all of the motions of the defendants for dismissal of the above entitled action for failure of the plaintiff to prosecute the same, be and they are hereby denied; and it is further

Ordered that the above entitled cause be, and it is hereby set for trial before this Court upon the merits to commence on the 20th day of July, 1954, at the hour of 10 o'clock a.m.; and it is further

Ordered that the above entitled cause be and it is hereby set for pretrial conference before this court on the 17th day of May, 1954, at the hour of 2 o'clock p.m.; and it is further

Ordered that if by fault of the plaintiff the above entitled cause is not ready to proceed to trial as set on the 20th day of July, 1954, the cause will then be dismissed for failure of the plaintiff to prosecute the action; and it is further

Ordered that upon the pretrial conference on the 17th day of May, 1954, the defendant, State of Washington, may renew its motion to dismiss the above entitled action as to such defendant on the ground that this Court has no jurisdiction in this action over the State of Washington.

Done in open Court this 20th day of April, 1954.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

/s/ P. H. WINSTON,
Of Counsel for Plaintiff.

Approved and Notice of Presentment Waived:

/s/ (Illegible),

/s/ E. P. DONNELLY,

Assistant Attorney General.

[Endorsed]: Filed April 20, 1954.

[Title of District Court and Cause.]

STATEMENT OF DEFENDANT, STATE OF
WASHINGTON, AS TO ITS POSITION
ON JURISDICTION

Counsel for the State of Washington are advised that the pretrial order now being prepared will show that plaintiff intends to assert title to tidelands belonging to the sovereign State of Washington and, therefore, feel it their duty to suggest to the court in the words of the rule of Civil Procedure 12 (h) that since the sovereign State of Washington has consented to be sued only in the superior court of that county of the State of Washington in which the property is situated (RCW 4.92.010) this court, if it has jurisdiction as against defendants other than the State of Washington, has no jurisdiction as to the sovereign State of Washington.

One quotation from *Monaco v. Mississippi*, 292 U.S. 313, 329, should suffice to sum up this well settled principle:

“Protected by the same fundamental principle, the States, in the absence of consent, are immune

from suits brought against them by their own citizens or by federal corporations, although such suits are not within the explicit prohibitions of the Eleventh Amendment. *Hans v. Louisiana*, supra, (134 U.S. 1); *Smith v. Reeves*, supra, (178 U.S. 436); *Duhne v. New Jersey*, supra, (251 U.S. 311, 314); *Ex parte State of New York*, No. 1, supra, (256 U.S. 490, 498).” (Citations supplied.)

Where the sovereign state is not made a defendant in name the suit will be dismissed for lack of jurisdiction if it is actually a suit against the state.

Williams v. American Security and Trust Co., 91 F. Supp. 421. *Copper S. S. Co. v. State of Michigan*, 194 F. (2d) 465.

A motion to dismiss this case for want of jurisdiction as to the State of Washington was presented to and denied by Judge Lindberg and a similar motion is now contained in the state’s answer.

It is, nevertheless, proper under the cited rule of civil procedure to suggest lack of jurisdiction as the court is not required to wait until the trial of this case on the merits and the court is not bound by Judge Lindberg’s ruling.

In *Mills v. United Association of Journeymen, etc.*, 83 F. Supp. 240, the court held that jurisdiction over the subject matter of the controversy is never *res judicata*. One motion attacking the jurisdiction having been overruled, the propriety of the second motion was questioned, and the court said on page 244:

"At whatever stage in the proceedings a lack of jurisdiction is apparent to the court, at that time it is the duty of the court to consider and pass upon its jurisdiction. *Gayle v. Jones, et al.*, D.C., 63 F. Supp. 481; *Emmons v. Smitt, et al.*, D.C. 58 F. Supp. 869, certiorari denied, 326 U.S. 746, 66 S. Ct. 59, 90 L. Ed. 446. Jurisdiction over the subject matter of a controversy is never *res judicata*. The law is well stated in *Blossfield v. Pacific Tank & Pipe Co.*, D.C., 15 F. 2d 889, 890, where the court states in a case where a prior motion to dismiss for the lack of jurisdiction was overruled, and a subsequent motion on the same grounds was sustained:

" 'Plaintiff argues that the earlier ruling has become the law of the case, and that it therefore may not be set aside. Were not the jurisdiction of the court in question, this must have been conceded. * * * It would be not only an extraordinary but a useless thing to permit the trial of a case which, on the allegations of the complaint, must be dismissed for want of jurisdiction at the close of the plaintiff's case; which, if not then dismissed, must be dismissed, on the court's own motion * * * at any time before the entry of a final decree at which the lack of jurisdiction was suggested; and which, on appeal, would be dismissed, rather than reviewed, because of lack of jurisdiction.'

"So, in the light of the aforementioned opinions, the plaintiff's contention that the subject of jurisdiction has been once determined and is now conclusive, is without merit, and must be denied."

When the state's original motion was presented to Judge Lindberg it was necessarily presented on the plaintiff's complaint. Paragraphs XII and XIII of this complaint apparently state a cause of action against defendants other than the State of Washington in that they affirmatively allege that “* * * the rights of the defendants and any person claiming by, through, or under them should be forever barred and declared to be invalid and without any legal effect by any grant from the state of Washington.” (Emphasis supplied.)

Moreover, the motion was argued orally to Judge Lindberg at least partially as a fishing right case. The pre-trial order now in the course of preparation will contain a claim of title to tidelands which have not been disposed of by the state, part of which the state is using for its own purposes, and all of which have been uniformly and continually in the possession and ownership of the State of Washington in its sovereign capacity.

The pleadings on the filing of the pre-trial order will pass out of the case so that the question of the court's jurisdiction of an action in which it is sought to deprive the state of tidelands which it is subjecting to its own use will be squarely presented to the court.

While the Attorney General is not authorized to confer jurisdiction if there is none (*Title Guaranty and Surety Company v. Guernsey*, 205 Fed. 94, cited in *MacVeigh v. Unemployment Comp.*, 19 Wn. (2d) at page 389), and while the question of jurisdiction may be raised at any time even on

appeal, orderly procedure and common courtesy require that the matter be called to the attention of the trial court at the earliest opportunity.

O'Connor v. Slaker, 22 F. (2d) 147, is a case wherein one of the counts plaintiff sought to quiet title against any claim of a sovereign state. It was, of course, held that the court was without jurisdiction to do this. The position of the Attorney General in O'Connor v. Slaker gave the court considerable trouble. Counsel for the state in the case at bar, therefore, desire at the earliest opportunity to suggest to the court that this is now a case against the state, and that if the court has jurisdiction of this case against any defendants other than the State of Washington, it does not have jurisdiction against the sovereign state, because that state has not waived its immunity from suit other than in a state court. The state has always been allowed to intervene in actions brought against its grantees in this jurisdiction without waiving its sovereign immunity and without causing the court to lose jurisdiction, if any, of the case against the state's individual grantees. The state has never been sued in this or any other jurisdiction.

In one of the earliest cases, U. S. v. Ashton, 170 F. 509, Judge Cushman pointed out that the state intervened in an action brought against its grantees to acquire title to tidelands “* * * merely to preserve its sovereignty.”

U. S. v. McGowan, 2 F. Supp. 426, in reality involves two cases affecting the title to tidelands. In one of them the state was allowed to intervene in

the aid of its grantee and so in the second case the state was made a nominal party defendant but no affirmative relief was asked against the state. Judge Cushman said:

“* * * No statute of the state of Washington has been called to the court’s attention authorizing a suit such as the present against the state to be brought in a District Court of the United States. An examination of the bill of complaint, however, shows that no affirmative relief is asked against the state of Washington, although it is prayed that the court confirm the treaty rights of the Quinaielt and Quillehute Indians, including the individual plaintiffs above named as members of the former tribe, in and to the use and enjoyment, as a usual and customary fishing ground upon the tidelands described in the bill without license or lease from the state of Washington. This court may consider the rights and powers of the state in determining issues asserted by the United States against the individual and corporate defendants, claiming under rights acquired from the state, although it may not undertake to determine and enforce such rights against the state itself or its officers.” (Emphasis supplied.)

The U. S. District Court for Oregon in the exercise of its discretion refused even to allow the states of Washington and Oregon to intervene in a similar case and approved the underlined portion of Judge Cushman’s language just quoted. *U. S. v. Columbia River Packers Assn.*, 11 F. Supp. 675,

680. (Citing *Minnesota v. Hitchcock*, 185 U.S. 373, to the effect that the supreme court has exclusive jurisdiction over all controversies of a civil nature [title to real property] where the state is a party.)

As this court pointed out in *United States of America, plaintiff, v. State of Washington, et al., defendants, and Louise Napoleon Johns, et al., cross-defendants*, Civil No. 1529 in the United States District Court for the Western District of Washington, Southern Division, all the issues in a case involving title to tidelands may be directly and expeditiously tried in the proper superior court of the State of Washington under the authority contained in RCW 4.92.010 and without any question of jurisdiction being involved.

It is proper to consider this fact where the jurisdiction is questionable. *Williams v. Virginia Military Institute*, 198 F. (2d) 980.

The State of Washington respectfully submits, however, that this court will not either grant or attempt to enforce any judgment against the sovereign State of Washington. We trust the court will not consider the suggestion of lack of jurisdiction as being prematurely made.

Respectfully submitted,

/s/ DON EASTVOLD,

Attorney General,

/s/ E. P. DONNELLY,

Assistant Attorney General.

[Endorsed]: Filed March 16, 1955.

City of Tacoma
Washington
Office of City Attorney

October 5, 1955

Miss Edith E. Redmayne
Deputy U. S. District Court Clerk
Federal Building
Tacoma, Washington

In re Cause 1183 — Skokomish Indian Tribe v.
France, Trustee, et al.

Dear Miss Redmayne:

In answer to your notice concerning the above case, I would like to point out that although the matter may be technically at issue and ready for trial, Judge Boldt on April 18, 1955, signed an order to the effect that the cause would not be heard for trial until a pretrial order had been signed. That order placed the burden on the plaintiff to initiate a conference with the attorneys for the defendants so that a pretrial order might be prepared for presenting to the Court. To date no communication has been received by this office concerning any conference with the plaintiff and therefore I do not think the order of the Court has been complied with and the matter is not yet ready for assignment for trial. For this reason I think the matter should be stricken from the trial setting on December 1, 1955. I trust that this will answer your letter.

In the event that you determine the matter is not to be on the trial calendar on December 1, would

you be kind enough to notify this office as well as the other counsel involved in this cause.

Yours very truly,

/s/ W. L. BROWN, JR.,
Asst. City Attorney.

WLB:k

[Stamped]: Received October 6, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S ACTION
FOR FAILURE OF PLAINTIFF
TO PROSECUTE ITS ACTION

Comes now the City of Tacoma, one of the defendants in the above-entitled action and moves the above-entitled Court to dismiss the plaintiff's action, on the grounds that the plaintiff has failed to prosecute its action within the time allowed by law.

Dated this 6th day of July, 1956.

MARSHALL McCORMICK,
City Attorney,

/s/ By W. L. BROWN, JR.,
Assistant City Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF W. L. BROWN, JR., ASS'T
CITY ATTORNEY, IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S ACTION FOR FAILURE
OF PLAINTIFF TO PROSECUTE

State of Washington,
County of Pierce—ss.

W. L. Brown, Jr., being first duly sworn, on oath deposes and says: that he represents the defendant, City of Tacoma, in the above-entitled action and that he makes this affidavit in support of defendants' Motion to Dismiss Plaintiff's Cause of Action for Want of Prosecution. This case was filed December 3, 1948, and was served on the City of Tacoma on May 5, 1949. That thereafter there have been several motions argued in this matter and the case had been set for trial April 1, 1953. This setting was vacated at the request of one of defendants' counsel and was again placed on the Assignment Calendar May 5, 1953. It was again on the Assignment Calendar August 31, 1953. Defendants then filed a Motion to Dismiss the Plaintiff's cause of action for want of prosecution. Thereafter the Court signed an Order April 20, 1954, denying said Motion but provided that if the plaintiff did not proceed to trial as set on the 20th day of July, 1954, the cause would then be dismissed for failure of the plaintiff to prosecute the action.

This trial date was vacated and a final trial date

of April 25, 1955, was given all parties. In conjunction therewith the Court also set several pretrial conferences. The pretrial conferences were held and the defendants had prepared a proposed pretrial order. Thereafter the plaintiff and defendants met on April 14, 1955, for a preparation of a final pretrial order to be presented to the Judge prior to the trial scheduled for April 25, 1955. Plaintiff's counsel, Mr. Lyle Keith, was present and the pretrial conference was adjourned by all parties until the following day, at which time the conference was to be held at the office of Mr. Wm. Evenson in Seattle. Mr. Keith promised to attend. On the following day, April 15, 1955, your affiant was present in Mr. Evenson's office and Mr. Keith did not appear. A telephone call was made to his hotel but we were advised Mr. Keith had checked out. Thereafter Mr. Evenson called the Court and informed the Court that no pretrial order was ready for the Court's consideration. The Court therefore indicated he would vacate the April 25, 1955 trial date. All attorneys were notified of this action by letters sent out to all counsel. This letter was dated April 15, 1955. That letter also informed all counsel that if they had any objections to call your affiant by April 18, 1955, otherwise your affiant would advise Judge Boldt in open Court of the situation. No calls were received by your affiant and on April 18, 1955, your affiant appeared in open Court and informed Judge Boldt of the situation. At that time Judge Boldt struck the matter from the trial date of April 25, 1955, and in an oral order from the

bench provided that no trial date would be set until a pretrial order had been signed.

Thereafter there was correspondence between all parties as to a new trial date. However, no action has been taken by the plaintiff, either by way of requesting a date for a pretrial conference or requesting that the matter be set for trial by the Court. Fourteen months have elapsed since said trial date.

/s/ W. L. BROWN, JR.

Subscribed and sworn to before me this 6th day of July, 1956.

/s/ IRENE D. STRONG,

Notary Public in and for the State of Washington,
residing at Tacoma.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

REASONS AND BRIEF OF AUTHORITIES
IN SUPPORT OF DEFENDANTS' MO-
TION TO DISMISS PLAINTIFF'S AC-
TION FOR FAILURE OF PLAINTIFF
TO PROSECUTE ITS ACTION

All of said defendants, with the exception of the State of Washington, join in this motion to dismiss plaintiff's action, in accordance with the Federal Rules of Civil Procedure, Rule 41 (b), and the local rules of Civil Procedure of the United States District Court for the Western District of Washington, Rule No. 41.

The State of Washington does not join herein

because the State has made a continuing objection as to the jurisdiction of the above-entitled Court over the State of Washington in this action.

This action was served on defendant, City of Tacoma, on May 14, 1949, and filed December 3, 1948. Since that time the matter has been set a number of times for trial. The last time this matter was set for trial by the Honorable George H. Boldt, was for the 25th day of April, 1955. At the time it was set for trial on this date, the Judge also set the matter for a number of pretrial conferences. These pretrial conferences were held but no final pretrial order was agreed upon and Judge Boldt, on April 18, 1955, entered an order to the effect that the matter would not be set for trial until the pretrial order had been signed and presented to the Court. By this order, the Judge placed a burden on the plaintiff to present a pretrial order and have the matter set for trial.

Since that time, no action has been taken by the plaintiff, although fourteen months have elapsed since this order was entered by the Judge.

This defendant and all other defendants, excluding the State of Washington, feel that this is a proper case for a dismissal for failure of plaintiff to prosecute its action in the manner required by the Federal Rules of Civil Procedure, as well as the local Rules of Civil Procedure.

The power of the Court in this respect is set forth clearly in Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Volume 2, Sections 917 and 918. Such a motion, of course, is ad-

dressed to the Court's sound judicial discretion.

Where the plaintiff has failed to prosecute its action with reasonable diligence, the Court may dismiss the action on defendants' motion or on its own motion. What is reasonable diligence differs with each case. In the case of *Shotkin v. Westinghouse Electric & Manufacturing Company*, C.A. 10th, 1948, 169 F. 2d, 825, the Court held that where a plaintiff in August, 1943, instituted an action for injunctive relief and damages under the Sherman Anti-Trust Act and from time to time plaintiff filed numerous groundless motions and engaged in tactics indicating a studied purpose to drag case along without trial, and on March 11, 1947, the Court entered order reciting that case would be dismissed for failure to prosecute unless cause to the contrary was shown before May 6, and no substantial affirmative showing was made by plaintiff as to why case should not be dismissed, dismissal of case on May 16, 1947, was not an abuse of discretion.

It has also been held in *Hicks v. Bekins Moving & Storage Co.*, C.A. 9th, 1940, 115 F. 2d, 406, that the dismissal by the Federal District Court in Washington of its own motion in an action for injuries sustained from alleged conspiracy in violation of Sherman Anti-Trust Act, was not an abuse of discretion where cause had been called sixteen times during period of over twenty months before being set for dismissal and present counsel had been corresponding with original counsel relative to assuming duties of attorney for plaintiff for period of almost eight months, during which time the for-

mer attorney was having case "watched" without disclosure to the Court. This case also held that the defendants were not required to show specific impairment of their defense in order to justify Court to dismiss its own motion, since the law will presume injury from unreasonable delay. This case further held that an order of dismissal for want of prosecution may be granted, notwithstanding the plaintiff has been stirred into action by impending dismissal, since subsequent diligence is no excuse for past negligence.

The Courts have held that a delay of sixteen months is unreasonable in the case of *United States v. Bernstein*, C.C.A. 5th, 1948, 116 F. 2d, 466. The Courts have also held that a delay of two years was unreasonable in the case of *Tinkoff v. Jarecki*, C.A. 7th, 1953, 208 F. 2d, 861. It has also been held that a delay of two or three years is unreasonable in the case of *United States v. Pacific Fruit & Produce Co.*, C. A. 9th, 1943, 138 F. 2d, 367. It has likewise been held that a cause pending for more than six years was unreasonable. *Refior v. Lansing Drop Forge Company*, C.C.A. 6th, 1942, 124 F. 2d, 440, it has also been held that where, after filing suit, no action was taken in it by plaintiff for one year and three months, action was properly dismissed for want of prosecution. *Salmon v. City of Stuart, Florida*, C. A. 5th, 1952, 194 F. 2d, 1004. See also *Livingston v. Hobby*, D.C.P.A. 1954, 127 F. Supp. 463, and *Timmons v. United States*, C.A. 4th, 1952, 194 F. 2d 357.

The defendants likewise feel that this action

should be dismissed by the Court with prejudice. Such a dismissal is within the discretion of the Court and is provided for in the Federal Civil Rules of Procedure, Rule 41 (b). Such a right also is recognized and has been applied in *Hicks v. Bekins Moving & Storage Co.*, cited above, and Section 917 *Barron & Holtzoff* as above cited.

Defendants likewise point out to the Court that a Motion to Dismiss this same cause for want of prosecution by plaintiff, was heard at a prior time and the motion was denied. However, the Order Denying the Motion to Dismiss signed April 20, 1954, provided in part that if plaintiff was not ready to proceed to trial as set on the 20th day of July, 1954, the cause will then be dismissed for failure of the plaintiff to prosecute the action. That trial date was eventually changed at the instance of Mr. Evenson, representing some of the defendants, to April 25, 1955. However, the plaintiff was not ready for trial on April 25, 1955, even though defendants had drafted a proposed pretrial order. The plaintiff has again not shown diligence in getting this matter disposed of and defendants feel within their rights by asking the Court to dismiss plaintiff's cause with prejudice.

Dated this 6th day of July, 1956.

MARSHALL McCORMICK,
City Attorney,

/s/ By W. L. BROWN, JR.,
Assistant City Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

Pretrial conferences having been had herein, plaintiff being represented by its attorneys of record herein, Keith, Winston & Repsold, by Lyle Keith and P. H. Winston, and the several defendants by their respective attorneys of record herein, the Court determines that the parties have settled upon the terms of this order, as follows:

Admitted Facts

For the purposes of this action, it is by the parties hereto agreed that the following matters may be accepted by the Court as true, without the necessity of further proof thereof:

I.

That plaintiff is incorporated under the Act of Congress of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

II.

A treaty between the United States of America and certain Indian tribes was made January 26, 1855, the full text of which is Exhibit 1 herewith, and appears in full in 12 Stat. L., at pages 933 to 937, inclusive, and was proclaimed April 29, 1859.

III.

Article II of said treaty is as follows:

“Article II. There is, however, reserved for the present use and occupation of the said tribes and

bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so."

IV.

On February 25, 1874, the following Executive Order was issued:

"Executive Mansion,
February 25, 1874.

"It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855, (Stats. at Large, Vol. 12, p. 934), described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up

said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33 and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, the same being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26 and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.

U. S. GRANT."

* * * * *

Plaintiff's Contentions

Plaintiff, without the concurrence therein of defendants, makes the following contentions:

I.

That the Skokomish Indian Reservation includes tidelands on the Hood's Canal and the Skokomish River abutting the original boundaries of said Skokomish Indian Reservation.

II.

That the uplands, together with the shorelands in Hood's Canal, became and were reserved to the exclusive use, benefit, and occupancy of the Skoko-

mish Indian Tribe, together with the exclusive right for the use of the bed of Hood's Canal and all tidelands touching upon or bordering the reservation, and with the exclusive right as guaranteed by Article IV of the treaty of January 26, 1855, to fish in all the waters bordering upon the reservation as set out by said executive order, including the tidal waters which border upon and touch the reservation.

III.

That the exclusive right of fishing was to be free from interference from the State of Washington or any person or persons claiming under or by virtue of any title granted them by the State of Washington and subject only to the exclusive jurisdiction of the United States.

IV.

That any rights claimed by the State of Washington or of any person or persons claiming through or under the State of Washington with respect to such tidelands are in conflict with and in derogation of the reserved rights of the plaintiff.

V.

That the rights of the plaintiff herein are paramount and superior to any right or to any title of whatsoever nature claimed by the defendants.

VI.

That the title and/or right of the plaintiff, the Skokomish Indian Tribe, in and to the tidelands as hereinabove described, should be quieted in said

plaintiff and that the claimed rights of the State of Washington and the other defendants and any persons claiming through or under them should be forever barred and declared to be invalid and without any legal effect.

VII.

That the plaintiff and its members have an exclusive right to fish and take shell fish as it and they desire upon any and all such tidelands herein described adjacent to the Skokomish Indian Reservation and that in any event the defendant State of Washington and any and all of the defendants cannot exclude the Skokomish Indian Tribe and the individual members thereof from fishing and taking shell fish from such tidelands and all thereof when and as they may desire.

VIII.

That the jurisdiction of this Court arises in this matter for the reason that plaintiff is an Indian Tribe incorporated under the Acts of Congress, and the rights demanded to be protected arise out of an Indian treaty entered into between said Indian Tribe and the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IX.

That it was the intent and purpose of the United States of America and the tribes of Indians executing said treaty of January 26, 1855, to encourage said tribes of Indians to reside at one place on a reservation to be set aside for their use and occu-

pancy, which was done by the Executive Order of President Grant, dated February 25, 1874. That the tracts of land so selected were to be sufficient for their wants as they then existed and continued to exist in the future.

X.

That by reason of the tidal waters flowing and ebbing in the Hood's Canal there are certain lands bordering upon the reservation of the Skokomish Indian Tride as hereinabove described, which provide an excellent and profitable source of shell fish having use for human consumption and a high commercial value.

XI.

That the State of Washington cannot claim immunity from suit in Federal Court in this action which relates to rights of plaintiff vested prior to statehood, which rights the State of Washington was required to respect and observe as a condition precedent to admission to statehood.

XII.

That all matters and things alleged and asserted by the defendants do not constitute a defense to the action.

XIII.

That the plaintiff Tribe has never conveyed or agreed to convey its rights asserted herein to the State of Washington or any of the other defendants in this action.

XIV.

That the tidelands constituting a portion of the

reservation were not appurtenant to or a part of any individual allotment made to any individual Indian upon said reservation and did not pass to any individual Indian under the allotment or under any conveyance of said property comprising any allotment, whether said conveyance was made by the United States or by the individual allottee.

Defendants' Contentions

Defendants, without the concurrence therein of plaintiff, make the following contentions:

1. Defendants deny the claims of plaintiff asserted in its complaint.

2. Plaintiff's claims and allegations do not state a cause of action or a basis upon which any relief can be granted herein.

3. The tide lands and tidal waters flowing and ebbing in and upon Hood Canal and the tide lands and tidal waters bordering upon the Reservation of the Skokomish Indian Tribe were never and are not now used commercially or extensively or at all by the plaintiff or its component or alleged members, trustees, agents or its predecessors in interest for fishing or otherwise, except that the Skokomish River which lies adjacent to and within the Reservation has been and is used for fishing purposes.

4. The only rights the plaintiff or its component members have in hunting and fishing outside the boundaries of the Skokomish Indian Reservation, if any, is a privilege to hunt and fish in common with other citizens and not a right to title to specific tide lands or tidal waters.

5. The land and the legal descriptions of land contained and mentioned in the Treaty and Executive Order and in the surveyor's notes and surveys and in Bureau and departmental correspondence and records do not contain, mention or include tide lands or tidal waters, and nothing therein grants, gives or conveys or reflects an intention to grant, give or convey to plaintiff or to any predecessor of plaintiff any right, title or interest in or to any land not therein described nor to any tide lands or properties which are now claimed by defendants.

6. The survey of public lands in the vicinity of Hood's Canal was not completed until the year 1873.

7. The survey of the exterior boundaries of the Skokomish Indian Reservation in the Territory of Washington described the same in part as follows:

“* * * Begin at a stake * * * on left bank of Skokomish River, thence north on west boundary * * * Set a post for corner to Sections 9, 10, 15 and 16 * * * East on north boundary and south line of A. D. Fisher's donation claim * * * Set post on west side of Hood's Canal and on the south boundary of A. D. Fisher's donation claim * * * Thence with the meander of Hood's Canal * * * To meander post on Township line of 21 and 22 North Range 4 West. Thence with the meanders of Hood's Canal and the Skokomish River to the place of beginning * * *”

See Exhibit

8. The reservation pursuant to said treaty, at the

time of the completion of the survey of the area by the Surveyor General, contemplated a north margin for said reservation south of the section line between Section 26 and Section 35, Township 22 North, Range 4 East, established by such survey. See Exhibit

9. The remaining northerly portion of said Section 35 and all land in said Section 26, Township 22 North, Range 4 West, abutting on Hood's Canal, was at the time of said survey in an area known as the A. D. Fisher Donation Claim. See Exhibit

10. One A. D. Fisher had proved up on said area, known as the A. D. Fisher Donation Claim and prior to the completion of said survey was entitled to a patent, which, however, could not issue until the completion of said survey, and he was entitled to said patent upon the completion of said survey.

11. As related in Exhibit, the United States Indian Agent for Washington Territory, the Superintendent of Indian Affairs, the Commissioner of Indian Affairs, the Secretary of the Interior, proposed an Executive Order enlarging the then reservation to include the A. D. Fisher Donation Claim and the enactment by the Congress of legislation to compensate A. D. Fisher for the taking of said land and for his improvements.

12. The appropriation to compensate said A. D. Fisher for the taking of said lands and improvements was enacted and the heirs of said A. D. Fisher were paid for such lands and improvements.

13. The Skokomish Indian Reservation was di-

vided into Indian lots by a deputy surveyor, acting under the Surveyor General, at the request of the Indian Agent, per Exhibit

Indian Lots Nos. 2 and 3 in Section 26, Township 22 North, Range 4 West, were each subdivided into Tract 1 and Tract 2, respectively, per Exhibit

Tract 1 of Indian Lot 3 in said Section 26, Township 22 North, Range 4 West, was then further subdivided into Tracts 1-A and 1-B, per Exhibit

14. The portion of said tide lands in Section 26, Township 22 North, Range 4 West, (abutting on said A. D. Fisher Donation Claim) was held in trust for the State of Washington to be formed, as abutting upon lands which in effect had passed from the public domain and passed to private ownership under the Act of September 27, 1850, and which donation claim the United States reacquired for the extension of said Indian Reservation by purchase from A. D. Fisher.

15. The State of Washington, to the extent that it is a predecessor in title to any of these defendants, obtained title to the tide lands below the line of ordinary high tide of Hood Canal by virtue of the laws of the United States and the provisions of the Enabling Act providing for the formation of the government of the State of Washington and its admission into the Union and the provisions of the Constitution of the State of Washington, accepted by the United States as in conformity with the laws of the United States and the provisions of said Enabling Act. The State of Washington thereby had and asserted its ownership of the beds and

shores of all navigable waters in the State up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, except lands patented prior to statehood. Plaintiff and its predecessors never had and cannot now assert any interest, title, or right to tide lands of the defendants or any of the properties of defendants. Said Constitution of the State of Washington so providing was accepted and ratified as conformable to the laws of the United States. The admission of the State of Washington into the Union was proclaimed by the President of the United States on November 11, 1889.

16. Insofar as the tide lands are or could be considered a part of said Reservation, the same were and are a part of the allotted lands conveyed and patented under the allotments and patents referred to in the Admitted Facts portion of this order.

17. That at the time of acquisition of said tide lands from the State of Washington by defendants and their predecessors, said tide lands were vacant and unoccupied.

18. Plaintiff has not instituted this action nor asserted its claims within the time limited by law.

19. During all of the time since each of the several grants, conveyances and patents referred to in the Admitted Facts portion hereof or in the Defendants' Contentions portion hereof and for more than ten (10) years each grantee, condemnor, or contract purchaser has been in the actual, continuous, exclusive, open, notorious, and obvious possession, enjoyment and occupancy of the related up-

lands and adjoining tide lands and all portions thereof.

20. The defendants and their predecessors in interest, respectively, have occupied, used and claimed said properties under color of title and claim of right for more than seven years prior to the institution of this action and have paid all taxes thereon levied and accrued for more than seven (7) years prior to the institution of this action.

21. If plaintiff was incorporated, as by plaintiff alleged, and has capacity to sue, as by plaintiff alleged, the same occurred more than ten (10) years prior to the commencement of this action the defendants and their predecessors in interest have been in the actual, exclusive, open, notorious and obvious possession, enjoyment and occupancy of all of the several properties in which the defendants are interested, as herein pleaded, and have openly and obviously cleared, cultivated, improved, built upon and developed said properties at great cost and expense, and during all such period have paid the taxes thereon.

22. The plaintiff, its predecessors in interest, its component members and agents have failed to assert any claim, title or rights to the tide lands involved up to the time of the commencement of this action notwithstanding the several defendants and their predecessors in interest since the time of the several patents, allotments, conveyances, judgments and grants herein referred to, have openly and obviously cleared, cultivated, improved, built upon and

developed said properties at great cost and expense. Any taking by plaintiff of any of said properties or parts thereof would unjustly deprive defendants of their said efforts, the betterments, and the investment of the defendants therein, and would unjustly enrich the plaintiff. Plaintiff is estopped and barred to claim or assert any title, interest or right in or to any part of the properties claimed by the defendants respectively.

23. The United States government by treaties and executive orders set aside for the use and occupation of certain Indians a tract of land bordering on the Skokomish River. The Indians were accustomed to taking fish from the waters of and on the shore bordering on the Skokomish River. Thereafter the State of Washington, claiming ownership to the tide lands bordering Hood Canal, sold said tide land to individuals who, in reliance on the State's claim of ownership, purchased these lands and made many and costly improvements thereon. Said Indians for many years past have been and are now intelligent and educated persons who have been fully aware of the claims of the State of Washington to the tide lands in question and of their sale by the State. Approximately seventy-five years after the United States government had set aside this Reservation to the Indians and after the defendants herein had purchased these tide lands and made improvements thereon and had increased the value of said lands, the plaintiff laid claim and asserted rights in these tide lands. The plaintiff has acquiesced, both by silence and conduct, for an

unreasonable period of time in the assertion of this claim and is now either estopped from asserting these alleged rights or barred by laches from claiming title to these lands.

24. There is a defect of parties plaintiff herein.

25. The court is without jurisdiction of the sovereign State of Washington, it not having consented to be sued in this court nor waived its immunity from suit.

26. The sovereign State of Washington retains mineral rights in many, if not all, of the tracts in controversy herein which it has sold under the laws of the State of Washington; retains title to certain others, certain of which it has, in the exercise of its sovereignty, occupied and still occupies for governmental purposes, such as highways and game preserves; and such use is necessary for the preservation of the government.

In reference to the several parcels referred to in Admitted Fact V and the paragraphs thereof, the State of Washington asserts the following claims of ownership or interest:

Paragraph 1—State owns all mineral rights.

Paragraphs 2 to 12, inclusive—State owns all the mineral rights in tide lands lying below mean low tide.

Paragraphs 13 to 17, inclusive—State owns all mineral rights.

Paragraph 18—State owns mineral rights in tide lands lying below line of mean low tide.

Paragraph 19—State owns all mineral rights in the entire oyster tract and also owns the rever-

sionary interest in the tract itself except that portion of the tract in front of Government Lots 1 and 2, Section 35.

Paragraph 20—State owns an easement for state highway over a portion of these tidelands.

Paragraph 21—State owns all mineral rights.

Paragraph 22—State owns this tract, James J. Smith having no interest therein.

Paragraph 23—State owns this tract.

Paragraph 24—State owns the reversionary right in this tract and owns all mineral rights.

Paragraph 25—State owns this tract.

Paragraph 26—State owns all mineral rights in this tract.

Paragraph 27—State owns all mineral rights in this tract.

Paragraph 28—State owns the tide lands in front of Indian Lots 1 and 2, Section 6, Township 21 North, Range 3 West.

Paragraph 29—State owns these tide lands.

Paragraph 30—Subdivision A—State owns the mineral rights in this property for which the City has an easement.

Paragraph 30—Subdivision B—State owns the fee subject to the City's easement.

Paragraph 31—State owns these tide lands subject to easement of the City of Tacoma.

Paragraph 32—State owns these tide lands used by State Game Department under provisions of Chapter 190, Laws of 1941.

27. In eminent domain proceedings prosecuted in the Superior Court of the State of Washington

for Mason County, Proceeding No. 1651, entitled "City of Tacoma, a municipal corporation, Plaintiff, vs. George H. Funk, et al., Defendants," and pursuant to due and lawful proceedings had and conducted therein, such right, title and interest of plaintiff and of plaintiff's predecessors in interest to the portions of the properties involved in this action which are embraced within the right of way of the transmission line of the City of Tacoma and its other installations and facilities of its municipal power plant were duly adjudicated and acquired.

28. A prior action to quiet the title to part of the lands which are the subject matter of this action, among other things, has been previously instituted by defendant Charles T. Wright in the case of Charles T. Wright, Plaintiff, vs. Paul Hunter, et ux., et al., Defendants, instituted in the Superior Court of the State of Washington for Mason County (filed July 30, 1948), under Case No. 5189. The Superior Court of the State of Washington for Mason County has prior and exclusive jurisdiction of the subject matter of this action, so far as said defendant is concerned, and of the parties thereto. The plaintiff herein is named as a party defendant in said Superior Court action and by reason of its failure and refusal to appear, answer or plead in said action an order of default has heretofore been entered against this plaintiff in said action. The Superior Court action is an action to quiet title, in which plaintiff could have raised by answer the issues set out herein,

and this controversy is subject to the determination, ruling and judgment of said Superior Court of the State of Washington.

29. This action has raised a dispute as to the location of the boundaries of the Skokomish Indian Reservation between plaintiff and some of the parties hereto and it may be necessary for the court to appoint a master or commission of land surveyors or engineers to survey some of the boundaries of said Reservation for the purpose of determining the location thereof.

30. The court is without jurisdiction of this action and of the defendants or any of them. The value in controversy, exclusive of interest and costs, does not amount to \$3000 as to any one of the defendants or his marital community.

Issues of Fact As Claimed By Plaintiff

I.

Whether it was the intent of the tribes executing the treaty of January 26, 1855, and the representatives of the United States Government negotiating said treaty on behalf of the United States Government to set aside for the exclusive use and benefit of the plaintiff tidelands bordering upon or adjacent to the reservation.

II.

Whether the effect of the presidential executive order of February 25, 1874, was to set aside to the plaintiff tidelands bordering upon or adjacent to the uplands reserved for the plaintiff by said executive order.

III.

Whether it was the intent of the tribes negotiating the treaty and the representatives of the United States Government to secure to the plaintiff an exclusive right of fishing on tidelands or waters bordering upon or adjacent to the uplands set aside and reserved for the plaintiff by the executive order of February 25, 1874.

IV.

Whether historically the Skokomish Indian Tribe and the tribes and bands which were settled on the Skokomish Indian Reservation were Indians whose needs and wants were served by fishing and gathering of shell fish in the tide waters of Hood's Canal and of the Skokomish River and whether Plaintiff has a paramount right to the use and occupancy of such tidelands for fishing and taking of shell fish and whether this right is paramount to all rights of all of the defendants to the tidelands herein described.

Issues of Fact As Claimed By Defendants

1. What is meant by the mouth of the Skokomish River, as stated in the Treaty, and where is it located?
2. Whether plaintiff has a superior title to the "tide lands" occupied and claimed by the State of Washington and by the several defendants.
3. Whether plaintiff, or anyone with whom plaintiff has a connected record title, ever had title to the "tide lands" claimed by defendants.

4. Whether the "tide lands" were a part of the Skokomish Indian Reservation.

5. Whether portions of the Reservation were lawfully allotted to individual Indians and title thereto vested in said individual Indians, their heirs and successors.

6. Whether the portions of the Reservation thus allotted to the Indians and the title thus vested in individual Indians or their heirs and successors included said "tide lands".

7. Whether defendants for more than ten years prior to the institution of this action have been in actual, open and notorious possession of the property claimed by plaintiff.

8. Whether defendants for more than seven years prior to the institution of this action have, under claim of right or color of title thereto, been in actual, open, notorious and adverse use and possession of the property in question and have paid taxes thereon for such time.

9. Whether defendants, under claim of right, to the knowledge of plaintiff, for more than seven years prior to the institution of this action, have exclusively occupied and held possession of said tide lands to the extent that they are capable of occupancy and possession, and whether the defendants respectively have cultivated, improved, reclaimed, developed and used the tide lands and, in the course thereof, expended moneys, time and effort and made valuable, tangible improvements thereon and upon tracts of land of which said tide lands are an integral part.

10. Whether the Skokomish Indians are or ever were dependent upon any food or fish from the several tide land properties in question and whether they have ever taken any food or fish from said tide land areas commercially or in appreciable quantities or at all.

11. Whether the benefits of the Reservation contemplated by the Treaty and the Executive Order were for the S'Klallam Indians and Indians other than the Skokomish Indians.

12. Whether the S'Klallam Indians, referred to in the Executive Order of February 25, 1874, are a tribe separate from and not the same as the Skokomish Indians.

13. Is the value in controversy (exclusive of interest and costs) as to each separate defendant \$3000.00 or more?

14. Whether any tidelands or tidal waters were ever mentioned, included or intended to be included in any surveyor's notes, surveys, correspondence or other departmental or Bureau record or in the Treaty or the Executive Order.

Issues of Law As Claimed By Plaintiff

I.

Where a quasi-political body cedes all of its right, title and interest to a body of land and waters bordering upon or adjacent to said land to a sovereign state in return for a conveyance back from the sovereign state of a smaller portion of said previously ceded lands and where such smaller portions of land border on and are adjacent to tidal and

navigable waters, does the conveyance back include exclusive title to the tidelands and shorelands bordering the navigable waters.

11.

Can the State of Washington, which came into existence after treaty rights were granted to the plaintiff herein, divest the plaintiff of those rights where one of the conditions upon which the State of Washington was admitted to the Union was that it disclaim any right, interest, or jurisdiction in and over rights previously vested in Indians or Indian tribes, and where the State of Washington has in law, but not in fact, disclaimed.

Issues of Law As Claimed By Defendants

1. Does the court have jurisdiction in this action of the State of Washington?
2. Does the court have jurisdiction in this action over the subject matter of this action and any of the defendants?
3. Does plaintiff have title to the properties which it claims in this action and, if so, from what source?
4. Does the plaintiff have any right entitling it to maintain this action and, if so, from what source and by virtue of what right?
5. Are the necessary parties for the maintenance of this action now parties to this proceeding?
6. Is the United States of America a necessary party to this action?
7. Are the S'Klallam Indians and other Indians

and tribes and bands of Indians and representatives thereof necessary parties to this action?

8. What is meant by "along Hood's Canal", as used in the Executive Order?

9. Is plaintiff corporation a grantee of or successor to all the interest beneficially provided for by the Treaty and Executive Order?

10. Did the State of Washington acquire title to the tide lands upon its admission into the Union?

11. Were the tide lands a part of the Skokomish Indian Reservation?

12. Were the tide lands in Section 26, Township 22 North, Range 4 West, at the location of the A. D. Fisher Donation Claim, a part of the Skokomish Indian Reservation?

13. Did A. D. Fisher or the State of Washington to be formed in Washington Territory have a right to the tide lands in Section 26, Township 22 North, Range 4 West, prior to the Executive Order of February 25, 1874, and in reliance upon the Act of September 27, 1850, antedating the said Treaty of January 26, 1855?

14. Were the tide lands a part of the related allotments to individual Indians and did the conveyances from the individual Indians to the present defendants or their predecessors in title include the related tide lands?

15. Is any right in plaintiff to maintain this action barred by limitation of law?

16. Have the defendants, as against the plaintiff, established a right to the properties in question by adverse possession?

17. Is plaintiff barred by laches to maintain this action or to obtain any relief herein?

18. Is plaintiff estopped to maintain this action and by estoppel precluded from the right to any relief herein?

19. Have the uses and development of the property by the defendants, the conduct of the plaintiff and of any predecessors in interest of plaintiff, been such as to create a situation where there would be an unjust enrichment of the plaintiff, if relief as prayed by plaintiff should be granted herein, and accordingly is the plaintiff precluded from any right to relief herein?

20. Is the value in controversy (exclusive of interest and costs) as to each separate defendant \$3,000.00 or more?

21. Does the Superior Court of the State of Washington for the County of Mason, in Proceeding No. 5189, entitled "Charles T. Wright, Plaintiff, v. Paul Hunter, et al., Defendants", have prior and exclusive jurisdiction of the subject matter of this action, at least so far as certain of the defendants herein are concerned who are also parties to said action in said Superior Court?

22. Is the plaintiff barred from the right to relief herein by reason of the proceedings had and the determinations made in said proceeding in the Superior Court of the State of Washington for Mason County, No. 5189, aforesaid?

23. Are the rights of the plaintiff or of its component members in hunting and fishing outside the boundaries of the Skokomish Indian Reservation,

if any, a privilege to hunt and fish in common with other citizens and not a right to title to specific tide lands or tidal waters?

24. Is this an action in which a dispute exists as to the location of boundaries, by reason of which it is necessary for the appointment of a master and/or commission of land surveyors or engineers to be made?

25. Did the City of Tacoma, a municipal corporation, defendant herein, as to the transmission line right of way by it claimed, acquire title thereto in part in the exercise of lawful eminent domain proceedings, barring thereby any further claim thereto by plaintiff?

26. Does the sovereign State of Washington retain mineral rights in the several tracts of land in controversy herein, under the enactments of the legislature of said State of Washington?

27. Does said defendant State of Washington, in the exercise of its sovereignty, occupy and have the right, for governmental purposes, to have and occupy highways and game preserves in the lands and areas claimed by plaintiff?

28. Are the defendants the legal owners of the several parcels of tidelands in issue by virtue of said tidelands having been vacant and unoccupied at the time of acquisition by the defendants and their predecessors respectively from the State of Washington and the further fact that defendants and their predecessors had color of title made in good faith to said lands and have paid all taxes

legally assessed thereon for seven consecutive years prior to the commencement of this action?

29. Is the condemnation action entitled *City of Tacoma vs. George H. Funk, et al.*, No. 1651, in the Superior Court of Mason County, Washington, *res adjudicata* as to the rights of the plaintiff in the property over which the City of Tacoma condemned a transmission line easement through said proceedings?

30. Do the patents issued by the United States to the various Indians on the Skokomish Indian Reservation prior to admission of the State of Washington to the Union, give such patentee title out to the government meander line?

31. Is this a collateral attack on a patent issued by the United States of America and one that cannot be maintained without the United States of America as a party thereto?

32. What is meant by the word "appurtenances" contained in the patents of the various Indian allottees in connection with the patents issued to them by the United States of America?

33. In any event, do the patents from the U.S.A. to individual Indians in which they were allotted certain property carry title to the low water mark?

34. Does the use made by the City of Tacoma of the tidelands in which the City of Tacoma is here involved, in any way interfere with the use of such tidelands by the plaintiff as set forth in that treaty referred to in Paragraph II of the Admitted Facts?

35. That at the time of acquisition of tidelands

from the State of Washington by defendants and their predecessors, said tidelands were vacant and unoccupied.

36. What rights are given to the plaintiff by reason of the treaty as referred to in Paragraph II of the Admitted Facts, in relation to the present claim of the plaintiff?

Exhibits

The exhibits of all the parties below listed were produced and marked and may be received in evidence, if otherwise admissible, without further authentication, it being admitted that each is what it purports to be, the right being hereby expressly reserved to object to the competency, relevancy or materiality thereof. Exhibits not listed will be admitted by the court where good cause is shown for the withholding or delay in presentation thereof.

Plaintiff's Exhibits

1. Copy of Corporate Charter of the Skokomish Indian Tribe.
2. Copy of the Constitution and By-Laws of the Skokomish Indian Tribe.
3. Copy of treaty entered into between the United States of America and the Skokomish Indian Tribe on January 26, 1855, 12 Stats. 933.
4. Copy of Executive Order dated February 25, 1874, setting aside the Skokomish Indian Reservation.
5. Photostatic copies of Government survey notes

delineating meander lines Skokomish Reservation (17 pages).

6. Photostatic copy of map of Skokomish Indian Reservation showing subdivisional lines and meanders, dated December 2, 1873.

7. Photostatic copy of map of Skokomish Indian Reservation as per Executive Order dated the 25th day of February, 1874, dated the 24th day of April, 1874.

8. Index map of Anna's Bay, dated June 7, 1952.

9. Copy of the resolution of authority passed by the Tribal Council of the Skokomish Tribe authorizing plaintiff's attorneys of record herein to institute and prosecute this action.

10. Minutes of proceedings leading up to the Treaty of Point-No-Point, January 25 and 26, 1855.

11. Letter from Governor Stevens to Mr. Mannypenny W537/1855.

12. Letter of February 21, 1874; Mr. Delano to Mr. Smith, National Archives, Report Book No. 24, page 125.

13. Letter of July 9, 1856, from Mr. Mannypenny to Mr. McClelland, National Archives, Report Book No. 9, page 359.

14. Instructions to Governor Stevens contained in letter dated August 30, 1854, from Charles E. Mix, Acting Commissioner of Indian Affairs.

15. Plat of Potlatch Tracts, Mason County, Washington.

Tideland Deed from State of Washington to Potlatch Commercial & Terminal Company dated

March 31, 1908—page 358, Volume 8, State Record of Tide Land Deeds.

Tideland Deed from State of Washington to Potlatch Commercial & Terminal Company dated June 6, 1911—Page 507, Volume 11, State Record of Tide Land Deeds.

Tideland Deed from State of Washington to J. T. Thacker, Millard Lemon and A. J. Falknor, dated June 6, 1911—Page 405, Volume 11, State Record.

Tideland Deed from State of Washington to Millard Lemon, J. T. Thacker and Lola F. Falknor, dated March 21, 1912—Page 353, Volume 11, State Record.

Tideland Deed No. 5790 from State of Washington to Potlatch Commercial and Terminal Company dated February 20, 1909—Page 62, Volume 9, State Record.

Tideland Deed from State of Washington to A. J. Falknor dated March 26, 1906—Page 320, Volume 7, State Record.

Tideland Deed from State of Washington to Homer Thacker, Lola Falknor and Jessie M. Hopkins dated March 26, 1906—Page 322, Volume 7, State Record.

Tideland Deed from State of Washington to Kimball Sherwood (Deed No. 10240), dated August 4, 1915—Page 28, Volume 13, State Record.

Tideland Deed No. 11929 from State of Washington to E. L. France dated October 22, 1918—Page 498, Volume 13, State Record.

Tideland Deed No. 14297 from State of Washing-

ton to F. G. Chapman dated April 22, 1925—Page 311, Volume 15, State Record.

Tideland Deed No. 14631 from State of Washington to Fred Hanson dated September 3, 1926—Page 504, Volume 15, State Record.

Tideland Deed No. 15568 from State of Washington to Fred Hanson dated May 7, 1929—Page 433, Volume 16, State Record.

Tideland Deed No. 15178 from State of Washington to E. A. Sims dated March 26, 1928—Page 125, Volume 16, State Record.

Tideland Deed No. 15168 from State of Washington to Frank A. Robison dated March 20, 1928—Page 119, Volume 16, State Record of Tide Land Deeds.

Tideland Deed No. 16050 from State of Washington to A. J. Falknor, Mrs. J. T. Thacker and Millard Lemon dated January 14, 1931—Page 66, Volume 17, State Record.

Tideland Deed No. 17179 from State of Washington to Casco Company and A. J. Falknor dated March 3, 1938—Page 253, Volume 18, State Record.

Tideland Deed No. 19390 from State of Washington to State Game Department dated October 11, 1946—Page 225, Volume 20, State Record.

Copy of order dated June 17, 1931, granting City of Tacoma right of way for transmission line over tide lands in Mason County—Filed in Office of Commissioner of Public Lands and a copy filed with Application No. 11328.

Photostatic copy of right of way plat submitted

by City of Tacoma to accompany Application No. 11328 for easement for right of way.

Copy of Order of June 14, 1921, granting City of Tacoma right of way—Copy filed with Application No. 11328, in office of Commissioner of Public Lands.

Topographic Survey T-1560-b by U. S. Coast and Geodetic Survey made in 1884.

Mason County Tideland Index Map No. 36.

Official map of Township 22 North, Range 4 West, W.M., approved July 26, 1873.

Official map of Township 21 N., Range 3 W., W.M., approved March 10, 1858.

Mason County Tideland Index Map No. 35.

Official map of Township 21 N., Range 4 W., W.M., approved November 23, 1861.

Mason County Tideland Index Map No. 37.

Plat of detached tide lands in Section 6, Township 21 N., Range 3 W., W.M.

State Road Plat No. 322 across Section 35, Township 22 N., R. 4 W., W.M.

Official map of Skokomish Indian Reservation in Township 21 North, Range 3 and 4 West, and Township 22 North, Range 4 West, W.M., approved November 28, 1884.

State survey in Section 35, Township 22 N. R. 4 W., W.M.

Defendants' Exhibits

1. Photostatic copy of publication entitled "Executive Orders relating to Indian Reservations from May 14, 1855, to July 1, 1912", printed by the

Government Printing Office in 1912, pages

2. Deeds and conveyances in the chains of title of the several defendants.

3. Photographs of Defendants' properties at various dates.

4. Plans, sketches and drawings showing improvement of defendants' properties and location thereof with reference to high water line and other boundaries.

5. Judgment roll in eminent domain proceedings, Mason County No., entitled "City of Tacoma, a Municipal Corporation, Plaintiff, vs."

6. Certified copy of record of proceedings in Superior Court of the State of Washington for Mason County, Case No. 5189, entitled "Charles T. Wright, Plaintiff, v. Paul Hunter, et al., Defendants".

7. Chart of Tribe relationships appearing on page 241 of Publication entitled "Contributions to North American Ethnology", Volume 1, Government Printing Office, 1877, at page 241.

8. Other historical documents or publications.

9. Field notes of Township 22 North, Range 4 West, W.M., so far as they relate to Section 26 therein.

10. Survey of Township 22 North, Range 4 West, W.M., per Surveyor General, July 26, 1873.

11. Map of Skokomish Indian Reservation showing numbered lots into which lands are divided by intermediate posts set by deputy surveyor at request of Indian Agent, conformable to field notes

on file in office of Surveyor General per certificate of May 19, 1885.

12. Supplemental diagram of Section 26, Township 22 North, Range 4 West, W.M., showing subdivision of Lots 2 and 3.

13. Supplemental plat of Section 26, Township 22 North, Range 4 West, W.M., showing subdivision of Tract 1, Block 3.

14. Documents concerning A. D. Fisher Donation Claim, furnished by the National Archives, consisting of:

i. December 8, 1873, letter from Marshall Blinn, Acting Superintendent of Indian Affairs, W. T., to Hon. E. P. Smith, Commissioner of Indian Affairs, Washington, D. C., with attached exhibits "A" to "F" inclusive.

Document "A"—Copy of appraiser's report to Superintendent of Indian Affairs.

Document "B"—Field notes of survey by A. C. Smith, deputy surveyor, certified by Surveyor General, showing exterior boundaries of Skokomish Indian Reservation in Territory of Washington.

Document "C"—Plat of the original Reservation marked yellow and the proposed change marked red, with the blue line designating the A. D. Fisher Claim.

Document "D"—Report of Edwin Eells, Indian Agent at Skokomish.

Document "E"—The certificate of final proof of A. D. Fisher Donation Claim, with the definite location by J. T. Brown, Register of the U. S. Land Office, Olympia, W. T.

Document "F"—Copy of letter dated February 3, 1866, from Superintendent W. H. Waterman to the Honorable Commissioner.

ii. February 28, 1874, letter from the Secretary of the Department of the Interior to the Speaker of the House of Representatives, transmitting draft of bill for relief of A. D. Fisher.

iii. Draft of bill for relief of A. D. Fisher.

iv. February 21, 1874, letter from E. P. Smith, Commissioner of the office of Indian Affairs, to the Honorable O. B. McFadden, of the House of Representatives, proposing description for Executive Order and proposing bill for the relief of A. D. Fisher.

15. A certified copy of Judgment in the Condemnation case City of Tacoma vs. George H. Funk, et al., No. 1651.

16. A certified copy of the file of the Bureau of Indian Affairs relating to the above condemnation.

17. Certified copy of receipt in said condemnation case signed by the Indian Agent and official representative of the Bureau of Indian Affairs.

18. Certified copy of patent from U.S.A. to Charles Cush.

19. Certified copy of deed from Charles Cush to H. N. Woolfield.

20. Certified copy of patent from U.S.A. to Charles Frank.

21. Certified copy of patent from U.S.A. to Ellen M. Rudy.

22. Certified copy of patent from U.S.A. to Mamie Wilbur.

23. Original file of George Adams, et al., vs. City of Tacoma, No. 428, in the Clerk's Office of the District Court of the United States for the Western District of Washington, Southern Division.

24. Map of original Skokomish Indian Reservation allotments showing names and numbers of individual allottees.

25. Certified copy of patent from U.S.A. to Joe Dan.

26. Certified copy of deed from Joe Dan to H. Woolfield.

27. Certified copy of patent from U.S.A. to Tyee Dick.

28. Certified copy of deed from Tyee Dick to H. N. Woolfield.

29. Certified copy of patent from U.S.A. to H. N. Woolfield.

30. Certified copy of patent from U.S.A. to Old Shell.

31. Certified copy of patent from U.S.A. to Old Hee Hee.

32. Certified copy of patent from U.S.A. to Wilson Waterman.

33. Certified copy of patent from U.S.A. to Samson.

34. Certified copy of patent from U.S.A. to Big Bill.

35. Certified copy of patent from U.S.A. to James Wilbur Haitwas.

36. Certified copy of survey of government meander lines bordering Skokomish Indian Reservation.

37. Certified copy of survey of Indian allotments on the Skokomish Indian Reservation.

38. Photostatic copy showing properties in which the City of Tacoma has an interest which are subjects of this law suit.

39. Certified copy of Judgment in City of Tacoma vs. Ellen M. Rudy, No. 1863.

40. Photographs of the Cushman No. 2 powerhouse bordering Hood's Canal.

41. Certified copies of patents to McKinney Pulsifer, Joseph Pulsifer, John Hawk, Squaxon George, Henry R. Allen, Sore Eyed Bill, American Machinery Association, Phoebe Moses and James Pulsifer.

42. Treaties of other Indian tribes in the State of Washington.

43. Photographs showing transmission line and towers at points involved in this action.

44. Certified copy of Judgment in Henry R. Allen, et al., vs. City of Tacoma, No. 2567, Mason County.

45. Photostatic copy of Noncompetent Indian Lands Deed, from Thomas Pulsifer, as Grantor, to E. L. France, Grantee, executed February 8, 1918.

46. Photostatic copy of deed, from State of Washington, as grantor, to E. L. France, as Grantee, to second class tide lands abutting upon north half of Tract 2, Lot 3, Section 26, Township 22

North, Range 4 West, W.M., Mason County, Washington, executed October 22, 1918.

Defendant State of Washington, at all times continuing its objection to any jurisdiction of this court over the sovereign State of Washington, by participating in the entry of this pretrial order, conferences therefor, or in approving this order, does not thereby consent to such jurisdiction nor join in any contentions expressed by any of the defendants for affirmative relief, such as for the designation of a commission of land surveyors or any other relief whatsoever.

No recital in or provision of this order shall in any case have any bearing upon nor affect the right, title and interest of any defendant as to any property or right as against any other defendant hereto, and this order and all proceedings leading up to this order shall be without prejudice as between the defendants respectively.

The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this Pretrial Order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

Entered at Tacoma, Washington, this 1st day of October, 1956.

/s/ GEO. H. BOLDT,

United States District Judge.

Form Approved:

Keith, Winston & Repsold, By Lyle Keith, Attorneys for Plaintiff.

Ryan, Askren & Mathewson, By Raymond P. Swanson, Attorneys for Defendants Simpson Logging Company and Frances Simpson.

Henderson, Carnahan, Thompson & Gordon, By Harry Sager, Attorneys for Defendants Marcus Nalley, et ux.

Glenn E. Correa, Attorney for Chas. T. Wright.

J. W. Graham, Attorney for E. L. France—Chas. T. Wright.

B. Franklin Heuston, Attorney for Chas. T. Wright.
Subject to right to prove claim of title.

Don Eastvold, Attorney General, By E. P. Donnelly, Attorney for State of Washington.

Robert R. Hamilton, City Attorney, City of Tacoma.

Charles R. Lewis, Attorney for Paul Hunter and Mary Hunter. Subject to right to introduce evidence of title.

Skeel, McKelvy, Henke, Evenson & Uhlmann, By W. E. Evenson, Attorneys for Defendants Carl J. Macke, et al.

[Endorsed]: Filed October 1, 1956.

[Title of District Court and Cause.]

TRANSCRIPT OF COURT'S
ORAL DECISION

rendered in the above-entitled and numbered cause in the above-entitled Court before the Honorable George H. Boldt, United States District Judge, on Wednesday, June 12, 1957, at the United States Courthouse, Tacoma, Washington.

Appearances: On behalf of the Plaintiff: Keith, Winston & Repsold, Attorneys at Law, Paulsen Building, Spokane, Washington. On behalf of Defendant Simpson Logging Company: Mr. Raymond P. Swanson, Ryan, Askren & Mathewson, Attorneys at Law, Henry Building, Seattle, Washington. On behalf of Defendant Marcus Nalley, et ux: Mr. Harry Sager, Henderson, Carnahan, Thompson, & Gordon, Attorneys at Law, Puget Sound Bank Bldg., Tacoma, Washington. On behalf of the Defendant State of Washington: Mr. E. P. Donnelly, Asst. Attorney General, Temple of Justice, Olympia, Washington. On behalf of the Defendants Carl J. Macke, et al.: Mr. W. E. Evenson, Skeel, McKelvy, Henke, Evenson & Uhlmann, Attorneys at Law, Dexter Horton Bldg., Seattle, Washington. On behalf of the Defendant City of Tacoma: Mr. Robert R. Hamilton, Tacoma City Attorney, Tacoma City Hall, Tacoma, Washington. On behalf of the Defendants Paul Hunter and May Hunter: Mr. Charles R. Lewis, Attorney at Law, Shelton, Washington. On behalf of the Defendants E. L. France and Charles T.

Wright: Mr. J. W. Graham, Attorney at Law, Shelton, Washington. On behalf of the Defendant Charles T. Wright: Mr. Glen E. Correa, Attorney at Law, Shelton, Washington. Mr. B. Franklin Hueston, Attorney at Law, Shelton, Washington.

The Court: That seems to conclude the points listed in Mr. Keith's memorandum with respect of jurisdiction.

On this last point concerning amount in controversy, I may say that I am not persuaded that the contention is well taken and have little difficulty in reaching the conclusion that the jurisdictional amount is sufficiently alleged and stated in both the complaint and the pretrial order.

An extremely interesting presentation of these points has been submitted. My compliments to counsel on a splendid presentation. Notoriously, jurisdictional questions in the Federal Courts often are difficult of solution. Primarily this is because of the difficulties inherent in our system of dual sovereignty. You do not need or want any further dissertation from me on so philosophical a matter as that.

In further reflection on my remarks earlier this morning in the argument, it has occurred to me that a solution of this matter not suggested by any counsel, may perhaps be the true answer to our problem. This case has been pending over eight years. It involves three thick files.

Unfortunately, prior to the argument I was not as familiar with the contents of those files as I

now am. I still am not fully familiar with all that has gone on before in this protracted litigation.

I now have examined Judge Lindberg's opinion, and it is quite clear the points now urged and suggested were not presented to Judge Lindberg. As a matter of fact, at the time Judge Lindberg wrote his opinion the United States wasn't in the case. It had been dismissed out previously, and I gather because it was supposed that only interests of Bonneville Power Administration were involved. When the complaint was prepared, apparently the United States was named as a party defendant with "Bonneville Power Administration" named in brackets on the theory that somehow or other Bonneville was concerned with the controversy. Apparently when the Justice Department or the Bonneville Power Administration concluded that they weren't interested they came in and asked that the United States be dismissed out of the case, and Judge Bowen signed an order dismissing the United States, reciting it was not a necessary party, without any opposition or without any question being raised. Obviously, all that was suggested to Judge Bowen at that time was simply that Bonneville had no interest in the case and, therefore, the United States might properly be let out. Thus it appears that none of my brethren have been given an opportunity to pass on the questions that you now raise, and, frankly, it would seem that some of you have not thought until recently about these serious jurisdictional questions.

So much by way of alibi for myself in not fully perceiving the situation presented on the jurisdictional questions before.

Regardless of the past, we must now consider the matter as it presently appears. On the first point raised relating to consent to suit by the State, I am still of the opinion, indicated earlier this morning; namely, that it is extremely doubtful whether there was or has been a consent by the State to be sued, particularly as far as the notice of appearance constituting a consent to suit or waiver of immunity from suit, whichever way you want to put it. It seems very doubtful to me that that will ever be so held in view of the philosophy of the Ford case wherein the Supreme Court announced that a state's immunity is absolute, and the Court will not strain itself to find waivers by interpretation. I am not entirely sure the first phase of that point based on RCW 79.08.020 is well taken. I think in considering whether that section gives the Attorney General the authority to consent, you must also consider the other section, 4.92.010 which specifically deals with jurisdiction. If you read the two sections together it may be seriously questioned whether the Attorney General is authorized to waive immunity from suit unless the Legislature has specifically set forth the class of cases in which he may do so, or something to that effect. But, gentlemen, after further thought about it, I do not think this the point we have for decision.

In view of the Candelaria case, I do not see how

it can be questioned that the Indians have juristic capacity. Candelairia says in so many words, and apparently there is no later authority to indicate the contrary. Now, if the tribe or individuals of the tribe have the capacity to sue, and the United States is a necessary party to the suit, it seems to me the Indians have a right to join the United States as a party plaintiff, whether the United States wants to be a plaintiff or not, somewhat similar to the procedure under the Miller Act. Some of you probably are acquainted with Miller Act procedure where private litigants are authorized to name the United States as party plaintiff even though the United States has no direct interest in the litigation. In Miller Act cases the statute expressly so provides. Incidentally, that statute may possibly be applicable to a situation of this kind. That has not been explored as fully as might be.

Rule 19 says: “(a) When a person who should join as a plaintiff refuses to do so, he may be made a defendant, or in proper cases, an involuntary plaintiff.” I think the United States as trustee for these Indians of lands wherein the fee is in the United States, should have been made a plaintiff in this action along with the Indians. The trustee should have been a plaintiff, and I think that the court, *sui sponte*, can direct it under Rule 19(a). If so, in an equity proceeding, at least, the old maxim ought to apply, that the Court will deem that done which ought to have been done, and in such case treat the case as

though the United States had been a plaintiff as of the commencement of the action. If that had been or can be deemed so, then, of course, the situation would fall squarely within the Oil and Gas case, United States vs. State of Washington, 233 Federal 2d, 811. Such solution would dispose of all of these contentions.

It is not for me to concern myself with the problems facing counsel in the ordinary situation, but here we have a case long pending in this court involving substantial interests of a lot of people, including the United States, the State, and others, and I am inclined to think that even at this late time I should consider requiring the United States to be made a party, and then upon its being made a party treat the case as though the United States were a party from the beginning and thus consider the case to fall within 28 U.S.C. 1345, which would confer jurisdiction on the court, both of the subject matter and of the person of the State of Washington.

Because this is a new and convenient idea, and therefore, perhaps, suspect, even in my own mind, and because none of you has had a chance to think about it, I believe the proper thing to do would be to direct that the United States be given notice that the court intends to consider making the United States a party plaintiff, and to treat that as having been done as of the commencement of the action, and to set the matter down for hearing when the United States can be heard on the subject, and all of you can be heard after consideration of

the suggestions that I have indicated in the last few minutes. Is my thought clear to all of you? I realize that my thought may not be well expressed because of its being newly acquired, but do you all understand what I have in mind?

In brief, it is this: The juristic capacity of the Indians to sue clearly appears, I think, from *Candelaria* and other cases; if they had the capacity to sue and it was necessary for the United States to be a party in such a suit, the United States should have been named as a plaintiff in the first place; the United States could have been named as a plaintiff in the first place because it is trustee for the Indians and holds the fee in some of the lands in question. If it had been so, the rule stated in *United States vs. State of Washington*, 233 Federal 2d, 811, would apply. In an equitable proceeding, or even an action at law, should not the action be deemed one commenced by the United States when it ought to have been commenced by the United States?

That in brief are my thoughts about it. Now, if that position is sound, it disposes of the "indispensable party" argument and it disposes of the "other action pending" argument. Perhaps it does not dispose of the amount in controversy, but as to that I am in no doubt. In any event, if we have jurisdiction under 28 U.S.C. 1345, the amount in controversy is not a jurisdictional requisite. It looks to me as though this may be the proper solution of the matter, but in order not to deal hastily with a matter that has apparently not seemed espe-

cially urgent to counsel during the last eight and a half years, I think I had ought to give you an opportunity to digest these thoughts and to point out wherein they are in error, as well as to hear from the United States before requiring them to be made a party.

I think, Mr. Driscoll, you will have to take such action to notify the United States as you deem proper. If you think it more appropriate I will issue a show cause order in formal fashion requiring the United States to appear and show cause why it should not be made a party. On the other hand, if it turns out the Justice Department is willing to come in and respond to my proposal without formality, that will be satisfactory to me if it is to you.

Now, I would like to get on with this very speedily because of the long pendency of this action.

Certificate

I, Gerald J. Popelka, Official Court Reporter for the within-entitled court, do hereby certify that the foregoing is a full and complete transcript of matters therein.

/s/ GERALD J. POPELKA.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

MOTION

The plaintiff, Skokomish Indian Tribe, by and through its attorneys of record, Keith, Winston & Repsold, hereby respectfully moves the Court to enter an order herein directing that the United States of America be joined as an additional party plaintiff herein and that the plaintiff, Skokomish Indian Tribe, be permitted to amend its complaint in the following particulars:

I.

That the caption of the above entitled cause be amended to read in part as follows: "The Skokomish Indian Tribe and the United States of America, plaintiffs, vs. E. L. France, Trustee, * * *", without any change as to the listed defendants.

II.

That a new sentence be added to Paragraph I of the complaint, said new sentence to read as follows: "That the United States of America holds the fee title in and to the lands hereinafter described, in trust, however, for the use and occupancy of the plaintiff, Skokomish Indian Tribe, and has a real and present interest therein, and said Tribe is entitled to the aid and protection of the United States of America to prevent the unlawful disposition of said lands."

III.

That Paragraph 1 of the prayer of said com-

plaint be amended to read as follows: "That this Court quiet title of said plaintiffs in and to the above described lands, the same to be held, administered and disposed of by the United States of America, conformably with the laws pertaining thereto, and for the use and benefit of the plaintiff, Skokomish Indian Tribe, and that the defendants herein be forever barred and estopped from claiming any right or title in and to said lands."

This motion is based upon the files and records herein and for the reason that the United States of America should be made a party plaintiff in order to accord full and complete relief between those already parties herein and for the reason that the United States stands in the position of holding fee title in the property mentioned in the complaint, in trust for the use and benefit of the plaintiff, Skokomish Indian Tribe, and is a real party in interest herein.

KEITH, WINSTON & REPSOLD,
/s/ By LYLE KEITH,
Attorneys for Plaintiff, Skokomish
Indian Tribe.

[Endorsed]: Filed July 31, 1957.

[Title of District Court and Cause.]

MEMORANDUM

Comes now Charles P. Moriarty, United States Attorney for the Western District of Washington,

and Charles W. Billingham, Assistant United States Attorney, acting by direction of the Attorney General of the United States in special appearance and without in any manner submitting the United States of America to the jurisdiction of the Court, to object to plaintiff's motion that the United States of America be joined as a party plaintiff in this cause of action for the reason that the Court has no jurisdiction over the Government in this cause, as more fully appears below.

I.

The United States of America is immune from the processes of all courts except in those specific instances concerning which Congress has waived immunity and consented that the Government and its instrumentalities may be sued or otherwise made party to litigation. We know of no Congressional waiver of immunity empowering the Court to join the United States as a party plaintiff to this cause of action.

II.

Moreover, the Attorney General of the United States has objected to such joinder. In 5 U.S.C. 309, et seq., Congress has delegated to the Attorney General the authority to initiate litigation on behalf of the United States. As the head of the Department of Justice, one of the major executive branches of the Government, the Attorney General alone has the responsibility and the right to determine when and in what manner the Government should assert its litigative rights.

New York v. New Jersey, 256 U.S. 296, 307-308; Booth v. Fletcher, 69 App. D.C. 351, 354; 101 F. 2d 676, cert. den. 307 U.S. 628; Castell v. United States, 98 F. 2d 88 (C.A. 2, 1938), cert. den. 305 U.S. 652; United States v. Northern Pacific Railway Co., 41 F. Supp. 273 (E.D. Wash. 1941).

III.

We note that the plaintiff Skokomish Indian Tribe has been incorporated as authorized in 25 U.S.C. 476, et seq. The statute in effect empowers the incorporated Tribe to manage its property, to assert and protect its property rights and to retain counsel for that purpose. Clearly, the Tribe has the capacity to bring this action on its own behalf. The United States is not a necessary party, at least in the jurisdictional sense.

Choctaw and Chickasaw Nations v. Seitz, 193 F. 2d 456 (C.A. 10, 1951).

The Attorney General having declined to consent that the United States be joined as a party plaintiff to this cause of action, we respectfully request that the plaintiff's motion for that action be denied.

/s/ CHARLES P. MORIARTY,

United States Attorney,

/s/ CHARLES W. BILLINGHURST,

Assistant United States Attorney.

[Endorsed]: Filed August 1, 1957.

[Title of District Court and Cause.]

TRANSCRIPT OF COURT'S
ORAL DECISION

rendered in the above-entitled and numbered cause in the above-entitled Court before the Honorable George H. Boldt, United States District Judge, on Friday, August 2, 1957, at the United States Courthouse, Tacoma, Washington.

Appearances: On behalf of the Plaintiff: Keith, Winston & Repsold, Attorneys at Law, Paulsen Building, Spokane, Washington. On behalf of Defendant Marcus Nalley, et ux: Mr. Harry Sager, Henderson, Carnahan, Thompson & Gordon, Attorneys at Law, Puget Sound Bank Building, Tacoma, Washington. On behalf of the Defendant State of Washington: Mr. E. P. Donnelly, Asst. Attorney General, Temple of Justice, Olympia, Washington. On behalf of the Defendants Carl J. Macke, et al.: Mr. W. E. Evenson, Skeel, McKelvy, Henke, Evenson, & Uhlmann, Attorneys at Law, Dexter Horton Building, Seattle, Washington. On behalf of the Defendant City of Tacoma: Mr. Robert R. Hamilton, Tacoma City Attorney, Tacoma City Hall, Tacoma, Washington. On behalf of the United States: Mr. Charles Billinghurst, Assistant United States Attorney, United States Courthouse, Tacoma, Washington.

The Court: The questions posed here are ex-

tremely difficult, at least to my limited understanding. I am trying to seek a practical solution. It is very regrettable that jurisdictional questions should not have been threshed out eight and half years ago shortly after the litigation was first commenced rather than now. However, I can't be charged with responsibility for that since I haven't held office anywhere near that long. Perhaps I can be charged with the responsibility of not looking into this the first time the matter was brought to my attention, but I suppose I had a right to assume that jurisdictional challenges had been resolved long prior to that time. In any case, I did so assume and, apparently, mistakenly.

My impression is that by implication the United States can be made a party but that implication will have to be drawn by a loftier tribunal than now sits. My second impression is that under the circumstances the United States is not an indispensable party. I rather go along with the reasoning of that Seitz case on that point, but here again, a loftier tribunal will have to resolve the question because to my mind, there are conflicting things said in these various decisions with respect to the United States as an indispensable party in this type of situation.

If I take jurisdiction when I have grave doubts about it, and go ahead and hear the case on its merits, we will be involved in a lengthy trial of numerous involved and complicated issues, putting many people to substantial additional expense be-

yond which that already occurred which will be wasted and lost if it ultimately be held there is no jurisdiction. On the other hand, if I resolve my doubt in favor of no jurisdiction, as has been the traditional practice of Federal District Courts, all of the questions presented can be reviewed and determined; namely, whether the State is properly a party, whether or not the United States is an indispensable party, and if so, can be joined without the consent of the attorney general, and so on.

(Discussion off the record.)

The Court: In view of the grave doubt I have concerning the jurisdictional questions involved here, I will deny the motion to make the United States a party, allow an exception; grant the motion of the State to be dismissed for want of consent to be sued; and hold that with the balance of the litigation there is a want of jurisdiction in this Court to hear and try the issue.

Accordingly, the action is dismissed without prejudice. Exception allowed.

Recess subject to call.

Certificate

I, Gerald J. Popelka, Official Court Reporter, in and for the above-entitled Court do hereby certify that foregoing transcript of proceedings is a true and correct transcript.

/s/ GERALD J. POPELKA.

[Endorsed]: Filed October 2, 1957.

In the District Court of the United States, Western
District of Washington, Southern Division

No. 1183

THE SKOKOMISH INDIAN TRIBE,
Plaintiff,
vs.

E. L. FRANCE, Trustee, et al., Defendants.

ORDER OF DISMISSAL

Be It Remembered that the above entitled action was filed in this court on the day of....., 1948, by plaintiff; that thereafter motions to dismiss and objections to jurisdictions were filed separately by various of the numerous defendants, which objections and motions have been continued as contentions of defendants in the pretrial order hereafter mentioned, and a pretrial order having been settled and entered herein October 1, 1956, superseding the pleadings in this action, and this court, by its order and direction of October 3, 1956, having required the several parties to submit additional briefs in respect to defendants' contentions numbered 24, 25, 28 and 30, as set forth in said pretrial order, and this matter thereafter coming on for further hearing, this court on June 12, 1957, by its further memorandum decision directed that a show cause order should issue at plaintiff's request requiring the United States of America to appear and show cause why it should not be made an addi-

tional party to the action, and plaintiff having received from the United States Attorney a letter dated July 23, 1957 advising that the Department of Justice would object to jurisdiction over the United States in this action and would oppose any order that it be made a party to the action, and on July 25, 1957 the plaintiff then making a motion giving notice of hearing of a motion to amend its complaint for the purpose of adding the United States of America as an additional party plaintiff, and the matter having been further heard by this court on August 2, 1957, and the court's further oral memorandum decision having been then announced, now therefore, pursuant to the announced decision of this court on August 2, 1957, it is by the court hereby

Ordered:

1. The motion of plaintiff to add the United States of America as an additional party plaintiff be and the same is hereby denied.
2. The motion of the State of Washington to be dismissed for want of consent to be sued is granted.
3. As to the balance of the litigation, there is want of jurisdiction in the court to hear and try the issues and the action is hereby dismissed without prejudice.
4. Exception is allowed the plaintiff as to each and all of the above rulings.

Entered at Seattle, Washington, this 6th day of December, 1957.

/s/ GEO. H. BOLDT,
Judge.

[Endorsed]: Filed and Entered December 9, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Skokomish Indian Tribe, the plaintiff above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal entered in this action on the 6th day of December, 1957.

Dated this 3rd day of January, 1958.

/s/ LYLE KEITH,
LYLE KEITH & PATRICK H.
WINSTON,
KEITH, WINSTON & REPSOLD,
Attorneys for Plaintiff.

Affidavit of Mailing Attached.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That the Skokomish Indian Tribe, the plaintiff above named, as principal, and Fidelity & Casualty Company of New York, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto each and all of the defendants herein in the just and full sum of Two Hundred Fifty Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1958.

The Condition of This Obligation Is Such, That, Whereas, on the 6th day of December, 1957, an Order of Dismissal was entered in the District Court of the United States for the Western District of Washington, Southern Division, in favor of the defendants in the above entitled cause and against the plaintiff above named; and

Whereas, the above named plaintiff, the principal herein, has heretofore given due and proper notice that it appeals from the said decision and judgment of the said District Court to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, if the said principal shall pay

to the said defendants above named all costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified not exceeding the sum of \$250.00, then this obligation to be void, otherwise to remain in full force and effect.

THE SKOKOMISH INDIAN
TRIBE,

/s/ By LYLE KEITH,
Its Attorney.

[Seal] FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

/s/ By CHARLES CARROLL,
Attorney.

Countersigned:

McGOVERN-CARROLL COM-
PANY,

/s/ By CHARLES CARROLL,
Resident State Agents at Spokane,
Washington.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME TO FILE REC-
ORD AND DOCKET CAUSE IN APPEL-
LATE COURT

The plaintiff, appellant, by its attorney of record,
move the Court for an Order Extending the Time

to file the record on appeal and docket the cause in the appellate court to and including the 5th day of April, 1958, upon the ground that the Notice of Appeal was filed on the 6th day of January, 1958, that forty days from that date have not yet elapsed and that additional time is necessary to properly prepare the record for the appellate court. This additional time is requested for the following reasons:

(1) The plaintiff tribe is presently considering the employment of a new counsel and such new counsel needs additional time within which to acquaint himself with the records and proceedings herein and to properly prepare the record for the appellate court.

(2) The present attorneys for the plaintiff are located a considerable distance apart and the plaintiff tribe is likewise located a considerable distance from either of its counsel rendering communication and consideration of the several items of appeal difficult and time consuming.

KEITH, WINSTON & REPSOLD,
/s/ By LEO J. DRISCOLL,
R. G. WIGGENHORN,
Attorneys for plaintiff-appellant.

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING APPELLANT'S TIME
FOR DOCKETING APPEAL AND FILING
RECORD ON APPEAL

This matter having come before the Court upon the motion of the plaintiff-appellant, by its attorneys of record, for an order extending the time for filing the record and docketing this cause in the appellate court and it appearing to the Court that 40 days have not elapsed since the notice of appeal was filed on the 6th day of January, 1958.

It Is Hereby Ordered that the time within which the plaintiff-appellant shall be required to file the record on appeal and docket this cause in the appellate court is hereby extended to and including the 5th day of April, 1958.

Done in Open Court this 1st day of February, 1958.

/s/ GEO. H. BOLDT,
Judge.

Presented by:

KEITH, WINSTON & REPSOLD,
/s/ By LEO J. DRISCOLL,
Attorney.

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING TRANSMITTAL OF ORIGINAL RECORDS TO COURT OF APPEALS

Comes now the plaintiff, by and through its attorneys, and moves the Court for an order directing the Clerk to transmit to the United States Court of Appeals for the Ninth Circuit in their original form the Pretrial Order signed by the Court on October 1, 1956 and all of the exhibits in this case, the exhibits to be retained by the Clerk until the parties hereto have completed their briefs.

This motion is based on the files and records herein, and on the affidavit of P. H. Winston attached hereto and by this reference made a part hereof.

Dated this 28th day of April, 1958.

KEITH, WINSTON & REPSOLD,
/s/ By P. H. WINSTON,
R. G. WIGGENHORN,
Attorneys for Plaintiff-Appellant.

State of Washington,
County of Spokane—ss.

P. H. Winston, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the Skokomish Indian Tribe, plaintiff-appellant in the above proceeding; that the Pretrial Order signed by the

Court on October 1, 1956 is a voluminous document, only a small portion of which should be included in the printed record in the Court of Appeals, the balance to be made available to the Court in its original form insofar as it may be relevant; that the exhibits identified in said Pretrial Order are bulky and need not be included in the printed record, but should be forwarded to the United States Court of Appeals for consideration in their original form to the extent that they may be relevant, said exhibits consisting of the Charter, Constitution and By-Laws of the Skokomish Indian Tribe, copies of relevant treaties and executive orders, photostatic copies of maps, letters, plats, conveyances, photographs of the properties involved, certified records of other court proceedings, surveys and patents, treaties of other Indian tribes, and other voluminous materials which should be examined by the Appellate Court in their original form; and that, consequently, said Pretrial Order and all of said exhibits should be sent to the United States Court of Appeals in their original form so that plaintiff, as appellant in that court, may move for an order to be relieved from printing and reproducing said Pretrial Order and exhibits; that it may be necessary for the parties to consult the exhibits in connection with the preparation of their respective briefs, so that said exhibits should be returned by the Clerk of the District Court until the briefs are completed and then forwarded to the Court of Appeals.

/s/ P. H. WINSTON.

Subscribed and sworn to before me this 28th day of April, 1958.

[Seal] /s/ LEO J. DRISCOLL,
Notary Public in and for the State of Washington,
residing at Spokane.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
ORIGINAL RECORDS TO COURT OF
APPEALS

This matter having come on before this Court on the motion of plaintiff for an order directing the Clerk to transmit certain original records in this case to the United States Court of Appeals for the Ninth Circuit, and the Court having considered said motion and the affidavit of P. H. Winston in support thereof, and the files and records in this cause, and being fully advised in the premises, now, therefore,

It Is Hereby Ordered that the Clerk of this Court send to the Clerk of the United States Court of Appeals for the Ninth Circuit in their original form the Pretrial Order signed by the Court on October 1, 1956 and all of the exhibits identified in said Pretrial Order, for the inspection of the Court of Appeals.

It Is Further Ordered that the Clerk shall hold the exhibits identified in said Pretrial Order, which

are ordered to be transmitted in original form in the preceding paragraph, until such time as the parties have completed their briefs in this case, at which time the exhibits shall be transmitted to the Court of Appeals in accordance with the preceding paragraph of this order.

Done in Open Court this 30th day of April, 1958.

/s/ GEO. H. BOLDT,
Judge.

Submitted by:

KEITH, WINSTON & REPSOLD,
/s/ By P. H. WINSTON,
Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, John A. Burns, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10, as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers and pleadings in the above entitled cause as are designated by Plain-

tiff's Designation of Record on Appeal (except the designated original exhibits which are retained by the Clerk of this Court, pursuant to Order, until the parties hereto have completed their briefs), and the said papers and pleadings constitute the Record on Appeal from that certain Order of Dismissal of the above entitled Court, filed and entered on December 9, 1957, to the United States Court of Appeals for the Ninth Circuit at San Francisco, and are identified as follows:

1. Complaint (filed Dec. 3, 1948).
2. Notice of Appearance on behalf of the State of Washington (filed July 14, 1949).
3. Motion of State of Washington to Dismiss (filed Apr. 27, 1951).
4. Memorandum Opinion and Order Denying Motions to Dismiss Complaint (filed July 29, 1952).
5. Pretrial Order (filed and entered Oct. 1, 1956).
6. Transcript of the Court's Oral Decision (filed July 25, 1957).
7. Motion of Plaintiff for Order to Join United States as Additional Party Plaintiff (filed July 31, 1957).
8. Memorandum of United States Attorney (filed Aug. 1, 1957).
9. Transcript of Court's Oral Decision (filed Oct. 2, 1957).
10. Order of Dismissal (filed and entered on Dec. 9, 1957).
11. Plaintiff's Notice of Appeal (filed Jan. 6, 1958).

12. Bond for Costs on Appeal (filed Jan. 6, 1958).

13. Motion to Extend Time to File and Docket Cause in Appellate Court (filed Feb. 3, 1958).

14. Order Extending Appellant's Time for Docketing Appeal, etc. (filed Feb. 3, 1958).

15. Motion for Order For Transmittal of Original Records (filed Apr. 30, 1958).

16. Plaintiff's Statement of Points to be Raised on Appeal (filed Apr. 30, 1958).

17. Order for Transmittal of Original Records and Directing Clerk of District Court to Retain Original Exhibits until Parties have Completed Briefs (filed April 30, 1958).

18. Plaintiff's Designation of Record on Appeal (filed Apr. 30, 1958).

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal, to wit: Plaintiff's Notice of Appeal: \$5.00, and that the said fee has been paid to the Clerk by the Plaintiff.

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court, at Tacoma, Washington, this 1st day of May, 1958.

[Seal]

JOHN A. BURNS,

Clerk,

/s/ By E. E. REDMAYNE,

Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, John A. Burns, Clerk of the above entitled Court, do hereby certify that I did, on the 1st day of May, 1958, transmit to the United States Court of Appeals for the Ninth Circuit, such of the original papers and pleadings as were designated by Plaintiff's Designation of Record on Appeal, heretofore filed in the above entitled cause, and

I do further certify that I am this day transmitting herewith such additional original papers and pleadings as are designated by Defendants' Designation of Record on Appeal, filed on May 7, 1958, and the said papers and pleadings constitute the Supplemental Record on Appeal to the United States Court of Appeals for the Ninth Circuit, at San Francisco, and are identified as follows:

1. Stipulation re dismissal of United States (filed Feb. 18, 1949).
2. Order Dismissing United States as Party Defendant (filed and entered Mar. 17, 1949).
3. Motion of defendants Chapman to Dismiss Action (filed May 23, 1949).
4. Amended Motion of defendant Wright to Dismiss Action (filed Feb. 21, 1949).
5. Motion of defendants Nalley to Dismiss Action (filed Aug. 17, 1949).

6. Motion of defendants Worl, et al. to Dismiss Action (filed Dec. 28, 1949).

7. Memorandum Brief in support State's Motion to Dismiss (filed Apr. 27, 1951).

8. Motion, defendants Simpson Logging Company, et al. to Dismiss Action (filed June 4, 1951).

9. Motion, defendants Hunter to Dismiss Action (filed Feb. 10, 1954).

10. Motion and Affidavit of defendant Wright to Dismiss Action (filed Feb. 10, 1954).

11. Motion of defendants France, Trustee, et al., to Dismiss Action (filed Feb. 19, 1954).

12. Motion of defendants, Hanson, et al., to Dismiss Action (filed Feb. 19, 1954).

13. Motion, City of Tacoma, to Dismiss Action (filed Feb. 19, 1954).

14. Affidavit, W. L. Brown, Jr., in support Motion of City to Dismiss (filed Feb. 19, 1954).

15. Motion of defendant, State of Washington, to Dismiss Action (filed Feb. 20, 1954).

16. Motion of defendants Carlson, et al. to Dismiss Action (filed Feb. 23, 1954).

17. Order Denying Motion to Dismiss, etc. (filed and entered April 20, 1954).

18. Statement of defendant, State of Washington, re Jurisdiction (filed Mar. 16, 1955).

19. Letter from City Attorney, Tacoma, to Clerk, Dist. Court re call calendar, etc. (Received Oct. 6, 1955).

20. Motion, City of Tacoma, to Dismiss Action (filed July 23, 1956).

21. Affidavit of W. L. Brown, Jr. in support Motion (filed 7/23/56).

22. Reasons and Authorities in support of Motion of all defendants except State of Wash. to Dismiss (filed July 23, 1956).

23. Defendants' Designation of Record on Appeal (filed May 7, 1958).

In Witness Whereof I have hereunto set my hand and affixed the official seal of the said District Court, at Tacoma, Washington, this 13th day of May, 1958.

[Seal] JOHN A. BURNS,
 Clerk,
 /s/ By E. E. REDMAYNE,
 Deputy.

[Endorsed]: No. 16008. United States Court of Appeals for the Ninth Circuit. Skokomish Indian Tribe, Appellant, vs. E. L. France, Trustee, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed and Docketed: May 5, 1958.

Supplemental Filed: May 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16008

THE SKOKOMISH INDIAN TRIBE,

Appellant,

vs.

E. L. FRANCE, TRUSTEE, et al.,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Comes Now the appellant, by and through its attorneys of record, and as its Statement of Points to be Relied Upon on Appeal, states as follows:

1. The Court erred in denying Plaintiff's motion to make the United States a party.

2. The Court erred in granting the motion of the State of Washington to be dismissed for want of consent to be sued.

3. The Court erred in ruling that as to the balance of the litigation there was want of jurisdiction in the Court to hear and try the issue.

4. The Court erred in ruling that the United States is an indispensable party in this proceeding, or in the alternative, in refusing to rule that the United States is not an indispensable party.

5. The Court erred in refusing to rule that it had jurisdiction of the subject matter and of all the

parties to the action save the State of Washington and therefore had jurisdiction to proceed with the trial of the action as to such other parties despite the dismissal of the State of Washington.

6. The Court erred in dismissing the action of the Plaintiff.

Appellant, as its Designation of the Record on Appeal, designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence in this action:

1. The Complaint.

2. Notice of Appearance filed July 14, 1949, by the State of Washington.

3. Motion to Dismiss filed April 27, 1951, by the State of Washington.

4. Memorandum Opinion and Order Denying Motions to Dismiss Complaint signed by Judge Lindberg and filed July 24, 1952.

5. Pretrial Order filed October 1, 1956.

6. Plaintiff's Exhibits 1 through 15 and Defendants' Exhibits 1 through 46.

7. Transcript of the Court's comments in connection with the hearing of June 12, 1957.

8. Motion filed July 31, 1957, by plaintiff.

9. Memorandum filed August 1, 1957, by The United States of America.

10. Transcript of the Court's Oral Decision rendered August 2, 1957.

11. Order of Dismissal filed December 9, 1957.
12. Notice of Appeal filed January 6, 1958.
13. Bond for Costs on Appeal filed January 6, 1958.
14. Motion to Extend Time to File Record and Docket Cause in Appellate Court filed February 3, 1958.
15. Order Extending Appellant's Time for Docketing Appeal and Filing Record on Appeal filed February 3, 1958.
16. Motion for Order Directing Transmittal of Original Records to Court of Appeals.
17. Order Directing Transmittal of Original Records to Court of Appeals.
18. Plaintiff's Statement of Points to be Raised on Appeal.
19. Plaintiff's Designation of Record on Appeal.

Dated this 28th day of April, 1958.

KEITH, WINSTON & REPSOLD,
/s/ By P. H. WINSTON,
R. G. WIGGENHORN,
Attorneys for Plaintiff-Appellant.

[Endorsed]: Filed May 5, 1958. Paul P. O'Brien,
Clerk.

[Letterhead of City of Tacoma.]

DESIGNATION OF APPELLEE

July 11, 1958

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, California

Skokomish Indians v. France, et al., #16008.

Attention Honorable Paul P. O'Brien,

Dear Sir:

We received your letter of June 24, relating to the supplemental transcript of record in the above-entitled case, sent to us pursuant to the designation filed in the district court.

Although the designation was signed by members of this office, the designation of the transcript was for and on behalf of all of the defendants in the above-entitled proceeding. I have contacted the various attorneys representing the defendants and they have all indicated that they feel that the designation of the complete supplemental transcript which we designated in the district court should be printed. While we appreciate that the several memoranda in the transcript as designated ordinarily do not form a part of the printed transcript it was the consensus of the thinking of the attorneys for the defendants that in this particular action the inclusion of such memoranda was warranted, in view of the fact that the case had been

pending for approximately ten years and that, in the opinion of the defendants, the plaintiffs had been dilatory in processing the same. We would therefore appreciate your including the several memoranda as designated in the designation filed with the District Court in the printed transcript.

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Yours very truly,

/s/ ROBERT R. HAMILTON,
Chief Assistant City Attorney.

RRH:r

[Endorsed]: Filed July 17, 1958. Paul P. O'Brien, Clerk.